92-1723

No. 93-_____

Supreme Court, U.S.
FILED
APR 27 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

ORANGE COUNTY POLITICAL COALITION, JAMES JACKSON, WARDELL SIMS, JAMES Q. MITCHELL, and a certified class of all black citizens of Orange County, Florida, who are now, who will be, or who have been eligible to vote since 1980,

Petitioners,

v.

THE ORANGE COUNTY, FLORIDA, BOARD OF COUNTY COMMISSIONERS, and BETTY CARTER, supervisor of elections, Orange County, Fla.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Eleventh Circuit correctly affirm summary judgment entered against a certified class of black voters who were refused any evidentiary proceeding, even to demonstrate the invidious discrimination in violation of their constitutional rights which motivated an official effort to dilute their voting strength in the election of commissioners for Orange County, Fla?

2. Was an expert's affidavit, (1) based on county commission elections in which no black had appeared, and (2) on exogenous county judge and school board contests, constitutionally sufficient to avoid proceedings at which the certified class could prove that a totality of circumstances warranted findings of white racial bloc voting sufficient to satisfy a prequisite for seeking relief from alleged violations of § 2 of the federal Voting Rights Act in Orange County, Fla.?

3. Was meaningful access to the federal court system denied to a certified class of black citizens, including absentee members, who were deprived of any timely, meaningful conference or hearing, and any evidentiary proceeding, before they were forever barred from asserting any federal constitutional or statutory challenge to the present system for election of commissioners in Orange County, Fla.?

PARTIES

All parties in this matter are set forth in the caption. In the reported decisions below, the late Cornell Williams continued to be listed as the first named plaintiff-appellant, although the courts had been notified that he passed away during the January week in 1992 when a visiting trial judge first entered summary judgment for defendants in this action. An organization, the Committee of Organized Groups, which appeared at the trial level as a plaintiff, no longer exists. County commissioners named individually were dismissed as parties at pre-trial proceedings.

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No. 93 ____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

ORANGE COUNTY POLITICAL COALITION, JAMES JACKSON, WARDELL SIMS, JAMES Q. MITCHELL, and a certified class of all black citizens of Orange County, Florida, who are now, who will be, or who have been eligible to vote since 1980,

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THE ORANGE COUNTY, FLORIDA, BOARD OF COUNTY COMMISSIONERS, and BETTY CARTER, supervisor of elections, Orange County, Fla.,

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, ORANGE COUNTY POLITICAL COALITION, JAMES JACKSON, WARDELL SIMS,

JAMES Q. MITCHELL, and a certified class of all black citizens of Orange County, Fla., who are now, who will be, or who have been eligible to vote since 1980, respectively pray that a writ of certiorari issue to review the judgment and opinion of the U.S. Court of Appeals for the Eleventh Circuit entered in this proceeding on Dec. 28, 1992.

CITATIONS TO OPINIONS BELOW

The judgment and per curiam ruling of the U.S. Court of Appeals for the Eleventh Circuit affirming summary judgment entered for Defendants on both claims is reported at 979 F.2d 1504. They are reprinted here, starting at p. 1a.. From the trial court, a judgment of Feb. 3,1992, and an order to deny plaintiffs' motion to alter or amend judgment of Feb. 26, 1992, are unreported. They likewise are here at pp. 4a and 5a, respectively. The affirmed order granting Defendants' motion for summary judgment; denying Plaintiffs' Motion Under Federal Rule of Civil Procedure 56(f), and also

denying all other pending motions, is reported at 783 F. Supp. 1348 and 1362 (M.D. Fla. 1992). The order begins at p. 7a and concludes with two statistical appendices, starting at pp. 1b and 1c.

RELATED RULINGS

Also in the appendix are the following unreported rulings at the trial level: a visiting judge's (1) order denial, on Jan. 28, 1992, of plaintiffs' motion to set aside a magistrate's order denying a discovery conference, p. 1d; (2) order by the Hon. Patricia Fawsett to take defendants' motion for summary judgment under advisement, Dec. 4, 1991, p. 2d; (3) notice of pre-trial conference, Dec. 10, 1991, p. 4d; (4) order of U.S. magistrate of Oct. 3, 1991 denying a motion for discovery conference, and resolving other issues, pp. 7d/8d; (5) order by the magistrate for scheduling of discovery, motion filing, and pre-trial stipulation, July 2, 1991, p. 8d; (6) orders by Judge Fawsett certifying the plaintiff class, on Dec. 7, 1990,

p. 10d, and (7) for a hearing on the motion for class certification, on Nov. 28, 1990, p. 11d; (8) unreported opinion order by Judge Fawsett, of Friday, Aug. 31, 1990, denying plaintiffs' motion for preliminary injuntion, p. 12d; (9) unreported order by Judge Fawsett, of Aug. 15, 1990, denying plaintiffs' motions for reassignment of case to another judge, and/or reconsideration of recusal, and setting a hearing on preliminary relief for Aug. 31, 1990, p. 20d; (10) notice of judicial reassignment, July 30, 1990, p. 22d; (11) unreported order of July 27, 1990, by Judge Fawsett denying plaintiffs' motion for recusal as it pertained to her, p. 23d; and (12) endorsement by the Hon. G. Kendall Sharp of plaintiffs' motion for recusal of judges resident in Orlando, Florida, "including himself and Judge Fawsett," p. 24d; (13) pre-trial stipulation excerpt, filed Dec 5, 1991, p. 28d; (14) order by Justice Anthony Kennedy, to extend time for filing petition for certiorari until April 27, 1993, p. 1e.

JURISDICTION

The judgment of the Court of Appeals affirming the District Court's dismissal of the case was entered on December 28, 1992. On March 18, 1993, Justice Anthony Kennedy entered an order extending the time for filing a petition for writ of certiorari to and including April 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> § 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of the life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of male citizens shall bear to the whole number of male citizens twenty-one years of age in such State....

§ 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Fifteenth Amendment to the United States Constitution provides:

> § 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
> § 2. The Congress shall have power to enforce this article by appropriate legislation.

§ 2(a) and (b) of the Voting Rights Act as amended, 42 U.S.C. §1973b is set forth in full in the published trial court opinion, Williams v. Orange County, 783 F. Supp. 1348, 1357-58 (M.D. Fla. 1992), and reproduced herein in the appendix.

42 U.S.C. § 1983, of the Civil Rights Act of 1871, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to

> be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution, and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding, for redress.

28 U.S.C. 144, **Bias or prejudice of judge**, provides:

> Whenever a party to any proceeding in district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice

> exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. 455a, **Disqualification of justice, judge, or magistrate**, provides in pertinent part:

> (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned....
> (d) For the purposes of this section, the following words or phrases shall have the meaning indicated: (1) "proceeding" includes pretrial, trial, appellate review or other stages of litigation.

Rule 23, **Class Actions**, Federal Rules of Civil Procedure, provides in pertinent part:

(a) **Prerequisites to a Class Action.**
One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(d) **Orders in Conduct of Actions.**
In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribed measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to inter-

vene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16 and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise**.

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 26(f), **Discovery Conference**, Federal Rules of Civil Procedure, provides in pertinent part:

At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

> (1) A statement of the issues as they then appear; (2) A proposed plan and schedule of discovery; (3) Any limitations proposed to be placed on discovery; (4) Any other proposed orders with respect to discovery, and (5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Rule 56, **Summary Judgment**, Federal Rules of Civil Procedure, provides in pertinent part:

> (b) **For Defending Party**. A party against whom a claim, counterclaim, or cross-claim

is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith, if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

....

(e) **Form of Affidavits, Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may

permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Rule 59, **New Trials; Amendment of Judgments**, Federal Rules of Civil Procedure, provides in pertinent part:

> (a) **Grounds**. A new trial may be granted to all or any of the parties and on all or part of the issues...(2) in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact, and conclusions of law, or make new findings and conclusions, and direct the entry of a new judgment.
> (b) **Time for Motion**. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.
> (c) **Time for Serving Affidavits**. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation....
> (e) **Motion to Alter or Amend a Judgment**. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 65, **Injunctions**, Federal Rules of Civil Procedure, provides in pertinent part:

> (a) **Preliminary Injunction**. (2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of a hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.

Rule 3.06, **FINAL PRETRIAL PROCEDURES**, Local Rules, United States District Court, Middle District of Florida, provides in pertinent part:

(c) The pretrial stipulation shall be filled with the Court no later than three (3) days before the date of the final pretrial conference (or at such other time as the Court may direct) and shall contain...(9) a concise statement of those issues of fact which remain to be litigated (without incorporation by reference to prior pleadings and memoranda); (12) a list of all motions or other matter which require action by the Court; and (13) the signatures of counsel for all parties.

(e) All pleadings filed by any party prior to filing of the pretrial stipulation shall be deemed to be merged therein, or in any subsequent pretrial order entered by the Court. The pretrial stipulation and the pretrial order, if any, will control the course of the trial and may not be amended except by order of the Court in the furtherance of justice. If new evidence or witnesses are discovered after filing of the pretrial stipulation, the party desiring to use the same shall immediately notify opposing counsel and the Court, and such use shall be permitted only by order of the Court in furtherance of justice.

STATEMENT OF THE CASE

Petitioners filed this voting rights action on July 23, 1990, about a week after nominations were closed for candidates seeking one of six single-member district seats or the chair elected at large for the Orange County, Fla., Commission. For 18 months thereafter, from the filing of a motion for preliminary injunction with the verified complaint, to halt the first use of that 6-1 system in a Sept. 4, 1990, election, through a timely motion to alter or amend the summary judgment in Feb[illegible] 1992, Petitioners filled the court file with public documents and news reports. They were submitted to explain how the 6-1 system was created to deprive blacks of voting strength to elect a candidate of their own choice for the newly created chair position in Orange County, Fla.

A DISCRIMINATORY DEVICE

Petitioners complained that the election system was nothing more than a spinoff of a coun-

ty charter device created in the 1980's by an identifiable all-white group of present and past former county commissioners, county attorneys, and a county administrator. Such a home rule charter seemingly was fair on its face, just as a literacy requirement or a poll tax might be. But the charter was intended to avoid a state-imposed county commission election system which would assure a meaningful voting opportunity for blacks. Whites who long controlled politics in Orange County sought a system to preserve their rule.

Public documents and news accounts dating from the '70's showed that the white county leadership was united in resistance to a Florida mandate for county commissioners to be elected from individual districts in which they resided, although those politicians differed on other issues.

With at-large election systems being challenged legally nationwide, some alternative was sought to avoid a system of pure single-mem-

ber district representation. Such single-member districting was referred to derisively as "ward politics," a term regarded by blacks as a code phrase or euphemism for meaningful black participation in the county political processes.

By 1984, Florida, led by the first black elected to the state legislature from Orange County in modern times, did favor such single-member districting for elections for county commissions, although an alternative with a sixth and seventh seat filled at large would be permitted. The latter 5-2 system at least avoided a singular seat, a chair, controlled at large by white voters, to dominate a county's legislative body. Either of the alternatives assured that a controlling chair would be elected among the commissioners themselves rather than by a white voting bloc.

HOW THE 6-1 SYSTEM CAME TO BE

By 1985, the all-white Orange County commission proposed avoiding the state-mandated

commission election system alternatives by securing home rule through enactment of a charter. They appointed an all-white nine-member commission headed by Tom Wilkes, now county attorney, to study the feasibility of charter government. He and/or the law firm with which he has been affiliated have served as attorneys for the county almost continuously since the 1970's.

In 1985, the primary drawback to charter government was the fact that the Orange County voters overwhelmingly defeated such proposals in separate referenda in the '60's and '70's, before "ward politics" became a factor. Some incentive was needed to prompt charter acceptance.

Again news reports and public documents offer insight as to how support for a charter was engendered among whites by the all-white committee created by the all-white commission. Appeals from local state legislators and from Orlando's mayor to diversify the committee at

least for credibility were ignored. So were black electors who were opposed to consideration of a charter, before voters were asked to replace an at-large election system with single-member districting for selection of county commissioners.

At public hearings in 1985-86, blacks, including Petitioners, asked that single-member districts be given priority, before consideration was given to charter government. They assured the white commission that a visit to the county's primary black quarter in Orlando would reflect how strongly blacks felt about single-member districting. The commission was unable or unwilling to meet in the black area.

Black leaders still came forward at downtown Orlando hearings to insist that county voters be given a choice about single-member district elections, as the state had mandated, before the charter escape route was used. Again, news reports and what became county legislative

history for charter government revealed that blacks perceived the "ward politics" code phrase as a signal to the white community to support a charter government to avoid black empowerment.

In 1986, the all-white committee headed by Wilkes and the all-white county commission placed a charter referendum on the ballot; the single-member districting issue was put on hold until the charter was resolved. The charter passed, with little more than a framework for the study of a future county commission election system. Public documents and news reports suggest that no other meaningful sign of governance was included in the Orange County's first charter.

Having a charter in place, the all-white county commission then created a 15-member Charter Review Commission (CRC) to study alternative forms of governance and election systems to be submitted to the voters in 1988. Whites did appoint two blacks among the 15 to study the issue. But the chair was the former

county administrator, the vice chair a former commissioner who long opposed "ward politics." And though Wilkes was not the CRC attorney, he did serve on the CRC and provided legal advice in support of a governing body whose chair would be elected at large. That legal advice also became part of a public record submitted by Petitioners when they filed suit.

By July 13, 1988, the CRC voted to submit a pure single-member district plan for elections to the county's governing body. An Orlando Sentinel editorial and the white mayor of Orlando cried out publicly against that plan. Those events were ignored by the judge designated for trial when he later resolved the case on defendants' motion for summary judgment. But he did put store in the action two days later by the CRC.

On July 15, 1988, the CRC reversed itself and placed two alternatives on the ballot--a proposition that five commissioners be elected

from single member districts, and another proposition for the 6-1 system to which Petitioners objected, because it did not resemble any election and/or governance system Florida required for its counties--including those under home rule.

In September, 1988, Orange County voters preferred both proposals on the ballot, to maintenance of the system of five commissioners elected at large. Had both propositios been defeated, the at-large commission system would have remained in place with a high degree of vulnerability to legal challenge. Indeed, in 1992, the judge designated for trial in this case stated that he would not have granted summary judgment were that full at-large commission election system in place. The Eleventh Circuit in otherwise affirming his decision disavowed his dicta.

In 1988, the pure single-member district plan was preferred by more Orange County voters, that the 6-1 system. But a white county attorney

advised before the election that if both were supported, the 6-1 system would become operative.

TOTALITY OF CIRCUMSTANCES

In 1990, this 6-1 election system was being used for the first time, after 40 years of county rule by a commission of five members, each of whom had been elected at large. But before 1950, when only whites had a meaningful vote in Orange County, "ward politics" did not prevent use of a pure single-member district plan, as noted in an affidavit from the Hon. Bob Webster submitted for Petitioners here in support of preliminary relief.

Judge Webster swore the changeover was made when Orange County, Fla., became the last of the 67 counties in the state to allow African-Americans to vote in what previously had been all-white partisan party primaries. By the time of the general election, it was a foregone conclusion that the Democratic party winner would prevail regardless of who voted. So a single-member dis-

trict election system was acceptable when "ward politics" were limited to whites.

But regardless what system had been in place for 120 years in Orange County, no black was known to have sought a county commission seat until 1990. To give blacks a meaningful opportunity for candidates of their choice, if not their race, the individual Petitioners had formed an Orange County Political Coalition a decade earlier.

The Coalition lobbied wherever possible in Orange County for offices to be filled by individuals selected from their own residential districts, rather than from at-large countywide races. Blacks, including the late Cornell Williams, a plaintiff below, often were quoted as calling for support of single-member election districts as the only incentive to encourage African-Americans to participate in the election process from which they had been excluded for decades.

In Orange County, there is minimal personal

contact between the black and white citizenry. De facto residential segregation remains prevalent in the county, so that, say, in its metropolitan center, Orlando, more than 95% of the more than 40,000 blacks in that city may be found living in the Southwest quarter of the municipality.

Almost all of the residents of one 100+-year-old community, Eatonville, are black. Several small towns in the county, like Ocoee, with a documented history of violent racism, Bithlo, and Windemere, are virtually all white.

POVERTY AMIDST PLENTY

The More populous cities of Apopka and Winter Park have identifiable black sections, sometimes, clearly located "on the 'wrong' side of the (railroad) tracks." And if there were any doubt that blacks fared far worse than whites economically, in Central Florida, in Orange County, in terms of income, wealth, and availability of resources, it was dispelled in 1988-89.

The City of Orlando in 1987 commissioned a study from the University of Central Florida, to ascertain why there was "poverty amidst plenty" in a more prosperous time, and what might be done to alleviate it. The Labor Study, of Poverty Amidst Plenty, revealed that the poor were disproportionately black and female in the Orlando Metropolitan Statistical Area, encompassing Orange County and two adjacent counties. The disparity was statistically significant, greater locally than nationally between blacks and whites, or even between African-Americans and Hispanics with whom they were compared separately. Except as evidence for proffered for trial here, the Labor Study findings and recomendations atrophied. The report was shelved by Orlando and ignored by Orange County.

From the outset in this legal action, as acknowledged in the August 31, 1990, opinion denial of preliminary relief, Petitioners offered Poverty Amidst Plenty and other non-legal materials

to demonstrate both the effects and likely motivation of the white county commissioners in the 1970's and 1980's to dilute minority voting strength in favor of their own constituencies in the white neighborhoods where they resided.

The present and former white county commissioners and paid officials had secured an election system that preserved what came to be known in the black community as one of "Snow White and the Six Dwarfs" after a woman became the first chair elected at large under the 6-1 system. Previously, the chair was chosen by the commissioners themselves, as one among equals.

That "6-1" chairperson spent 5-6 times as much as most of the individuals campaigning for the district seats, and received a salary more than three times greater than that of her colleagues. She now has executive powers such as personnel hiring and firing which previously had been exercised by appointed white county administrators.

Such facts continued to be added to the court file in this case in public documents and news reports.

But seventeen months later, after February 3, 1992, from the opinion granting summary judgment on a claim of intentional discrimination, Petitioners learned that such history, and proffered explanation for the cause and effects of the challenged 6-1 system in context, were considered irrelevant by the judge assigned for trial.

> Because the 6-1 proposal originated with the CRC and passed directly to the ballot without the approval of the BOCC (Board of Orange County Commissioners), evidence unrelated to this process is irrelevant to the claim of intentional discrimination.
> Williams v. Orange County, Fla., 783 F. Supp. 1348, 1357 (M.D. Fla. 1992, Hon. James L. Watson sitting by designation).

KEEPING THE CASE UNDER WRAPS

Unpleasant news about racial or economic disparity understandably was not, is not welcomed

in Orange County. The county once primarily was noted for its fruit; but since 1971, it has become a land of economic opportunity in the shadow of Disney World. For better or worse, the County is on public display for millions of tourists annually.

So on July 23, 1990, when Petitioners filed this action, they expected to be kept from public view as much as possible, not for legal reasons but for practical ones. Adverse publicity about racism in Disney World country hardly is good for tourism.

But no Petitioner could visualize that presiding jurists might abuse judicial discretion, and misuse federal rules of civil procedure, and judiciary and judicial practice, to render each of them to be the equivalent of Ralph Ellison's classic description of the Negro as Invisible Man.

From the time the verified complaint was filed until Petitioners found themselves on the street again without a day in court 18 months later, those blacks and their legal counsel were

given less than an hour of oral argument and no visible evidentiary opportunity to state their case.

Each side was given a half-hour to argue a motion about preliminary relief filed with the complaint 40 days earlier. Petitioners sought in their hearing opportunity on Friday, August 31st, to enjoin the first 6-1 county commission election in Orange County, scheduled for the next working day, after a Labor Day weekend.

In addition to legislative history obtained from the County's own files about the creation of the charter, and the 6-1 system, Petitioners presented affidavits, including one from an expert, Dr. Mark Stern. His data tended to show white and black racial bloc voting in national elections.

The data also was offered to show that the County knew or should have known in 1988 that no district with a majority of blacks could be created with the data it used, in a 6-1 system, though its white leadership publicly professed they wanted

to create such a district. Blacks including at least one who served on the CRC had stated in 1988 that seven to nine single-member districts would have to be created, if one were to contain a population in which blacks were in the majority.

In denying preliminary relief, Judge Patricia Fawsett, then presiding, ignored entirely Petitioners' claim that the data they were offering in pertinent part was to show the 6-1 system should be enjoined on constitutional aswell as on statutory bases, because it was created intentionally to maximize white election power and to minimize or dilute that of blacks. Petitioners had reason to believe that her "blind spot" to discriminatory intent may have been caused by her own personal prejudices against their views.

THE APPEARANCE OF JUSTICE....

Petitioners then were working under an umbrella organization of local African-American groups, the Committee of Organized Groups ("COG").

In October, 1988, on a COG motion, Judge Fawsett had recused herself in a currently stalled civil rights action. In that related case, it is alleged that the Orlando, Fla., 6-1 governing body has been racially resegregating the city by placement of various public projects without adequate black participation in the decision-making processes since the 1980's, COG v. City of Orlando, *88-962-Civ-Orl-18 (10)(M.D. Fla. 1988).

After Judge Fawsett and the Hon. G. Kendall Sharp recused themselves in the COG action, the case was transferred to a judge 75 miles away. He soon denied an Orlando motion to dismiss claims arising under 42 U.S.C. §§ 1981, 1982, and 1983, against the municipality. More than four years later, that case is awaiting resolution of class certification and trial before the fifth judge assigned to that action.

Believing the context to be similar for the COG action and this one below, COG, as a plaintiff

in this case, sought by motion and affidavit with the complaint to have Judges Sharp and Fawsett recuse themselves again. Judge Sharp immediately did so, and on July 23, 1990, the day the actio was filed, he granted a COG motion to disqualify himself--and Judge Fawsett.

But without explanation at any time, Judge Fawsett refused: to recuse herself; to reconsider her refusal; or to have the case reassigned, on separate motions filed for Petitioners before the preliminary hearing was held. So Judge Fawsett continued to preside throughout the pre-trial period.

After denying preliminary relief, she held only one hearing, on her own initiative, after attorneys for the named parties agreed to have a plaintiff class certified. Each side was given about 10 minutes each to describe the class in December, 1990. That was the last chance counsel were afforded to be heard by any jurist, about discovery and all other matters during the following year.

All attempts by Petitioners' counsel to be heard, in person, e.g., at a mandatory discovery conference, were denied without explanation, all motions on Petitioners' behalf ignored. For instance, Petitioners sought to disqualify Tom Wilkes, as county attorney because of his active role for defendants since the 1970's as a party to the CRC and as chair of the earlier commission.

When Petitioners' counsel discovered Wilkes' extensive historic role though a deposition taken of a former county administrator, they had sought to depose him as discovery time was running out. Wilkes proved unwilling to be deposed. So his removal as counsel was demanded, since he was anticipated to be a key witness at trial.

By Dec. 3, 1991, trial seemed inevitable, since counsel for both sides submitted a joint pre-trial stipulation required by local rules. Though defendants on Nov. 15, 1991, had filed a motion for summary judgment, both sides set forth

in the stipulation material facts they jointly believed were to be litigated. (See excerpt from Pre-Trial Stipulation in the appendix, and the requirements of the local rule presented supra). Though the judge designated for trial relied on that Stipulation in his published opinion, he made no mention of the material facts acknowledged to be in dispute between the parties. Other issues of mixed law and fact separately were in dispute.

On Nov. 15, 1991, counsel had been informed that the Hon. James L. Watson had been designated for trial. They would be attending a pre-trial conference on December 10, with him. However, though counsel for both sides agreed that a 2-3 week trial was necessary, Judge Watson was scheduled to be in Florida for less than a month.

Was Judge Watson assigned specifically to this case for that trial? Hardly. The Notice of Pre-Trial Conference listed this voting rights action as the 11th of 15 scheduled for pre-trial.

The other shoe dropped two days later. On Dec. 5, 1991, Judge Fawsett took under advisement defendants' summary judgment motion, though she left any delays they sought for pre-trial or trial purposes to Judge Watson. It was left unclear who would resolve the summary judgment motion. On that same Dec. 5th, Petitioners' counsel filed a motion and supporting papers pursuant to Rule 56 (e) and (f), of the Federal Rules of Civil Procedure.

The Rule 56(e) motion was based on an apparent misunderstanding by Petitioners' counsel that whatever affidavits defendants submitted on their supposed lack of intentional discrimination could not offset the inferences from the numerous public documents and their own legislative histories that there were material facts in dispute

on that claim. That contention of Petitioners' counsel was never addressed thereafter.

On December 10, 1992, Judge 'Watson met with counsel and said he would return on Jan. 2, 1992, with directions after he reviewed the case.

On Jan. 2, 1992, it appeared that the case file and Judge Watson had missed one another in transit. In chambers, Judge Watson said he would have the issue of summary judgment and the Rule 56(e)/(f) papers resolved by Jan. 12, 1992, and he would let counsel know about trial then. Nothing further in fact happened until Jan. 28th, when Judge Watson denied Petitioners' motion filed weeks earlier to have a judge review the magistrate's unexplained denial of a discovery conference mandated by Rule 26(f), Federal Rules of Civil Procedure. Summary judgment followed.

On Feb. 3, 1992, Before Judge Watson returned to New York, he left the written judgment and GRANT of summary judgment for Defendants

and DENIAL of the Rule 56(f) motion and all other pending motions for circulation. Petitioners timely filed scores of additional documents, affidavit and deposition excerpts to show that there were material facts in dispute.

They sought to have summary judgment altered or amended, especially with regard to the constitutional claim based on intentional discrimination. In those papers, Petitioners also pleaded with Judge Watson to protect the absent members of certified class, if he sustained summary judgment on the basis of the materials before him. For instance, what would happen if later evidence was uncovered to show conclusively that there had been or there is significant white racial bloc voting in Orange County? All blacks would be forever barred from making another § 2 claim against the 6-1 election system.

WHITE-ONLY CANDIDATE ELECTION DATA

Key to Judge Watson's granting of summary

judgment on the statutory claim were affidavits from one Defendant expert about white racial bloc voting. That expert relied on data from county commission races from 1980 through 1990, when no black ran for at-large office, and on exogenous county judge and school board elections in that period. The expert also considered the role of an Hispanic, Hernandez, in a 1982 School Board Democratic primary, (Williams v. Orange County, 783 F. Supp., at 1365) but he refused to do so when an Hispanic, Rodriguez, sought a commission seat. Rodriguez sought the minority seat created by political parties in the 6-1 county system, though no district then existed with a black majority.

After summary judgment, defendants timely opposed Petitioners' motion to alter or amend it. On Feb. 26, 1992 Judge Watson denied that motion.

On Dec. 28, 1992, the Eleventh Circuit, after oral argument, affirmed summary judgment with a per curiam opinion, Williams v. Orange County, 979 F.2d 1504 (11th Cir. 1992). That panel did disavow the following paragraph from Judge Watson:

> Nevertheless, the Court concludes that if this case were a challenge to the five at-large commissioner system that the 6-1 system replaced, the affidavit of Dr. Maggiotto (the aforementioned defendants' expert on white racial bloc voting) would be insufficent to meet movant's burden on motion for summary judgment. However, the 6-1 system was developed with the participation of the black community and was proposed in part in an attempt to facilitate minority participation in county government. Williams v. Orange County, 783 F. Supp., supra, at 1362.

After seeking and receiving an extension of time to file this petition, a certified class of African-American voters timely asks this Court to find that there are sufficient inferences of material facts in dispute on claims of constitutional and statutory violations of black voting rights in Orange County to warrant a trial or evidentiary hearing on the merits, before their right to be heard in open court about the 6-1 county commission election system, is lost forever.

REASONS FOR GRANTING THE WRIT

I. ELEVENTH CIRCUIT AFFIRMANCE OF SUMMARY JUDGMENT FOR DEFENDANTS ON A CONSTITUTIONALLY-BASED CLAIM OF VOTING RIGHTS DISCRIMINATION CONFLICTS WITH THE ONLY OTHER PUBLISHED CIRCUIT COURT DECISION ON THE ISSUE.

The Ninth Circuit summarily rejected a county's motion for summary judgment on a claim of constitutional violation of minority voter rights, Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990). The Garza court distinguished cases arising solely from alleged § 2 violations,

id., at 771. As discussed, infra, summary judgment even on statutory voting rights claims appears to be disfavored, except when it is clear, for instance, that plaintiffs simply cannot show under any circumstances that a district with a minority population in the majority could be created as an appropriate remedy for a challenged election system, i.e. one in which a minority would have a choice in selection of its representative(s), McNeil v. Springfield Park District, 851 F.2d 937, 940 (7th Cir. 1988), cert. den. 490 U.S. 1031 (1989).

A constitutional challenge not dismissed as frivolous or insubstantial calls into question not only the totality of circumstances but genuine issues of material facts in dispute about the subjective intent of defendants and their representatives in the creation and/or maintenance of an election system. This Court only recently acknowledged that it has not resolved how the Fifteenth Amendment to the U.S. Constitution may be appli-

cable in voting rights cases, Voinovich v. Quilter, 113 S.Ct. 1149, 1157 (1993). As for Fourteenth Amendment application, widespread reliance nationwide on a "results" test, in statutory voting rights challenges after §2 of the Voting Rights Act was amended in 1982, permitted parties and courts for the most part to avoid constitutional analyses and examination of intent behind creation or maintenance of particular local election systems, since Mobile v. Bolden, 446 U.S. 55 (1980).

In this case, the peculiar history involving identifiable whites who maneuvered for years to assure no more than token participation by blacks warranted the constitutional challenge to a 6-1 system which might appear to be fair on its face. County motivation was called into question by evidence of deliberate historic exclusion of black participation in the Orange County Commission processes. That evidence was offered in the form of public documents not readily susceptible to

summary resolution without evidentiary rulings, cf. Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988), and of news reports, McMillan v. Escambia County, Fla., 638 F. 2d 1239, 1248 (5th Cir. 1981). "(T)hough not legislative history, editorials written contemporaneously with the action are probative evidence of the motivation of the action" in a voting rights action, id..

As the Ninth Circuit correctly held, summary judgment is not appropriate to dispense with legitimate constitutional challenges in which alleged discriminatory intent by defendants in the creation and maintenance of an election system is called into question. That intent would be established here conclusively only by the testimony of the white elected county commissioners and white appointed officials who proposed and lobbied first for a charter and then a districting system to avoid governance by a legislative body elected entirely from single-member districts.

II. IN GRANTING SUMMARY JUDGMENT ON A CLAIM OF VOTING RIGHTS ACT VIOLATION, THE LOWER COURTS HERE ACKNOWLEDGED CONFLICT WITH THE FIFTH CIRCUIT IN THEIR RELIANCE ON DEFENDANTS' STATISTICAL DATA TO SHOW APPARENT ABSENCE OF WHITE RACIAL BLOC VOTING IN ORANGE COUNTY.

Lower courts, parties, and counsel agree that Thornburg v. Gingles, 478 U.S. 30 (1986), continues to be the starting point in any assessment of whether a violation of § 2 of the Voting Rights Act has resulted from creation of, or change in, a state or local election system. This Court in recent weeks has clarified the need for complainants challenging a system to bear the burden of proof to establish a violation, and to meet three preconditions before they can seek a remedy for alleged dilution of minority voting strength. See Voinovich v. Quilter, supra; Growe v. Emison, 113 S. Ct. 1075 (1993).

Those prerequisites are as applicable to challenges to single-member district or mixed at-large/single-member district election plans as they are to at-large election proposals, Growe v. Emison, 113 U.S., supra, at 1084. In particular here, Petitioners would be required to prove--not assume--racial bloc voting, at least to provide anecdotal evidence before they could proceed, id., at 1085. But this Court also has stated that such a factor cannot be considered mechanically, but must be viewed "under the totality of the circumstances," Voinovich v. Quilter, 113 S. Ct., supra, at 1157. Documents and anecdotal evidence apparently can be used when applicable to suggest that parties can meet the Gingles prerequisites and should have an opportunity to seek relief from a statutory violation, id., at 1158; Growe v. Emison, 113 S. Ct., supra, at 1085.

Here, the lower court relied on data submitted in affidavit form from defendants' expert

to determine that whites have not voted as a bloc to defeat black choices for the county commission, or to block black candidates in school board and county judge elections, 1980-90. Since plaintiffs had not proved otherwise by affidavits, the judge designated for trial granted summary judgment to defendants on the statutory claim.

That judge, however, said he would not have done so if the same data would have been offered when all the commissioners were elected at large, that is until 1990, but he was relying on the affidavit, because defendants had shown blacks participated in approval and implementation of the 6-1 system, Williams v. Orange County, 483 F. Supp., supra, at 1362. The Eleventh Circuit specifically disavowed that reasoning by the judge, Williams v. Orange County, 979 F.2d 1504, supra.

So in the Eleventh Circuit, it would appear that data from elections in which no minority candidate ever has sought the office can be used to

assess the "choices" of the affected minority. It would appear from the data published with the lower court opinion, such black "choices" can be discerned even when it is not reported how many black electors participated in each of the elections. The expert provided no breakout by race in the total vote. It thus is unclear whether the percentages he found are based on, say, 10, or 100, or 1,000 blacks who participated in exercising their choice for a particular white candidate.

The judge designated for trial specifically reported that his acceptance of such data was contrary to the decision from the Fifth Circuit in Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987). See Williams v. Orange County, 483 F. Supp., supra, at 1361.

The Eleventh Circuit accepted that assessment, in which the trial judge quoted from the Fifth Circuit decision: "'[I]mplicit in the Gingles holding is the notion that black preference is det-"

"ermined from elections which offer the choice of a black candidate. The various Gingles concurring and dissenting opinions do not consider evidence of elections in which only whites were candidates. Hence neither do we.' Gretna, 834 F. 2d at 503-4," Williams v. Orange County, supra, at 1361.

Further, none of the various Gingles opinions regarded the methodology used by the defendants' expert here as the sole or even preferable means to establish racial bloc voting or its absence. Here, such methodology was accepted, not to counter Petitioners' proofs below, but to bar blacks from even proving bloc voting by whites in other ways, say, by consideration of voting patterns in 1984 and 1988 presidential primaries in which Jesse Jackson appealed to large numbers of blacks and far fewer whites. Nothing in this Court's opinions in Gingles or later suggests that an affidavit from a voting rights expert in support

of a motion for summary judgment can defeat any opportunity a complaining party should have to meet its burden of proof on the prerequisite of racial bloc voting. This Court should now resolve the conflict of what proofs and when they must be submitted by plaintiffs who seek to satisfy the threshhold requirement of white racial bloc voting before they can proceed to demand a § 2 remedy.

III. IN AN ERA OF BURGEONING CRIMINAL CASE-LOADS, LOWER COURTS FIND THEMSELVES IN CONFLICT ABOUT THEIR LATITUDE TO INTERPRET STATUTES AND RULES OF JUDICIAL PROCEDURE AND PRACTICE TO DISPENSE WITH DISFAVORED CIVIL CASES, SUCH AS THIS CERTIFIED CLASS ACTION.

Chief Justice William H. Rehnquist last year was quoted as saying that a litigation explosion has made the federal courts a scarce resource. He opined that access to the courts one day may have to be regulated "on the basis of the greatest good for the greatest number," "Complex Suits," The National Law Journal, May 15, 1992.

The chief justice last month, however, signaled that the day is not yet at hand. For the Court, he opined in a reversal of a dismissal of a § 1983 complaint that judges below would have to change rules of civil procedure rather than deviate from them to rid themselves of cases with litle perceived merit, Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160 (1993).

The burden was considered to be so great in the U.S. District Court for the Middle District of Florida, where this case arose, that the active judges announced they would suspend their hearing of civil trials on Feb. 1, 1991, as "the only option remaining which might permit continued control of a burgeoning case load," "Middle District of Florida Suspends Civil Trials," The Third Branch, February, 1991, p. 9.

So the assignment of a visiting judge for the anticipated trial in this case was in keeping with

the self-imposed limitations by Judge Fawsett and the other active judges in the District., and with due process of law. However, other shortcuts taken in this voting rights action to expedite the matter away from court without any evidentiary opportunity were not in keeping with the application of federal standards for judicial practice and procedure in civil cases in other federal circuits.

The Fifth Circuit would have rejected both (1) the refusal of the judge designated for trial here to grant Petitioners' Rule 56(f) motion for continuance to complete taking and submission of discovery, upon receipt of counsel's non-evidentiary affidavit, and (2) the lower court jurists' denial without explanation of a motion for Rule 26(f) discovery conference. See Union City Barge Line, Inc., 823 F.2d 129, 136 (5th Cir. 1987), for the former holding, page 136; for the latter, page 133, and n. 11, for other citations to enforcement of such conferences in the Third, Seventh,

and Eighth Circuits. Neither magistrate nor judge here suggested that the discovery conference was not being held, because the rule's requisites had not been met, or because the discovery problem was insignificant. They stated no reason at all.

Petitioners' counsel first sought the conference, then the delay, when it became apparent that he was being denied access to key witnesses and information. By the time the Rule 56(f) motion was submitted, even the trial judge was prepared to concede that the expert and his data had been revealed at the 11th hour when Petitioners' counsel could have no timely access to him, Williams v. Orange City, 783 F. Supp., supra, 1352.

Petitioners not only were denied fair access to the court to control the discovery process, but they were denied opportunity for any meaningful pre-trial conference in chambers or court, since counsel never saw the designated trial judge after he reviewed the papers and, most significantly,

they were never given a chance to present evidence, proof by testimony, etc., either for preliminary relief, on the motion for summary judgment, or at any other relevant time. After the preliminary relief oral argument was held 40 days after the motion, Petitioners' counsel were not given any time to explain their positions in person.

The Eleventh Circuit has taken the position that entry into the courthouse and the right to file papers are enough to satisfy any constitutional right of access to the federal judicial system, Copeland v. Green, 949 F.2d 390 (11th Cir. 1991). A similarly limited view was offered in Brown v. Grabowski, 922 F.2d 1097 (3rd Cir. 1989).

However, the Second Circuit has decided that access is based on a fundamental constitutional right, Morello v. James, 810 F.2d 344 (2d Cir. 1987), at least when a constitutional question is at issue, as it is here, Gronne v. Abrams, 793 F.2d 74, 78 (2d Cir. 1986). The D.C. Circuit has said

that access is a constitutional right that may not be impaired, Urban v. United Nations, 768 F.2d 1497 (D.C. Cir 1985).

The applicability of the Due Process Clause to the issue is acknowledged in the First Circuit, Simons v. Dilhart, 804 F.2d 182 (1st Cir. 1987); Germany v. Vance, 868 F.2d 9, 15 (1st Cir. 1989). The Eighth Circuit has called for free and unhampered access, Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422 (8th Cir. 1986).

The concept of such access has been applied most frequently in the Fifth Circuit, see, e.g., Crowder v. Sinyard, 884 F.2d 804, 811 (5th Cir. 1989). In the seminal case of Ryland v. Shapiro, 708 F.2d 967, 971 (5th Cir. 1983), the Fifth Circuit found that access to courts, to sue and defend, rested on constitutional footing in Chambers v. B&O Railroad, 207 U.S. 104 (1907). The Ryland decision also stated that meaningful access was said to have been embedded in the right of pe-

tition in the First Amendment, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), but it is unclear if that refers to access to courts generally, that is, to state forums only.

Even if this Court decides that the named Petitioners have not been denied meaningful access in this case, certainly it cannot deny the absent certified class of tens of thousands of black citizens has been given no opportunity to be heard. Their counsel timely called for his own removal or class decertification, if necessary, so absentees would not be prejudiced. His plea went unheard.

An ongoing duty to make sure that a certified class is protected was stated in Key v. Gillette Co., 782 F.2d 5, 7 (1st Cir. 1986). Absentee members in particular must be protected, if a certified class is perceived as not being adequately represented, Guerine v. J & W Investment, Inc., 544 F.2d 863 (5th Cir. 1977). An appeals court has an obligation to protect the absentee

members if they were to lose all rights because of resolution of the merits in a dispute in which they have, or might have, a stake, Andrews v. Bechtel Power Corp., 780 F.2d 124 (1st Cir. 1985).

The Eleventh Circuit not only failed to find such a duty here, but it did not even bother to follow the rule of its predecessor on which it often has relied to review demands for judicial disqualification of a trial judge if they were timely made before the conclusion of the case, In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir. 1980, en banc). They were here.

Petitioners made clear from the outset through appeal that Judge Fawsett should not be allowed to sit, certainly without explanation, after COG filed an affidavit, pursuant to 28 U.S.C. §144, and explained why she should step aside, 28 U.S.C. §455a, especially after Judge Sharp granted the motion to disqualify both of them.

By its silence, the Eleventh Circuit apparently

adheres to its criticized practice of applying a "harmless error" interpretation to refusals for recusal, even when disqualifications are warranted, Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988), cert. den. 109 S.Ct. 2066 (1989).

Other federal circuits seek to apply the judicial disqualification statutes strictly, In re Faulkner, 856 F.2d 716, 720 (5th Cir. 1988); Barksdale v. Emerick, 853 F.2d 1359, 1362 (6th Cir. 1988), and the D.C. Circuit would provide retroactive relief, if necessary, Jenkins v. Sterlacci, 856 F.2d 274 (D.C. Cir. 1988).

If no petition were to issue, if this voting rights action is not remanded for evidentiary proceedings on the merits, certainly any of the tens of thousands of absentee class members, black voters who did not participate here, would appear to be fully justified in believing that expediency has replaced the appearance of justice in the federal courts most directly affecting them.

CONCLUSION

For the above reasons, certiorari should be granted to review the published judgment and affirmance, with exception, by the Eleventh Circuit of the published district court order of summary judgment in favor of defendants on constitutional and statutory claims raised by a certified class of black voters. The decision(s) below should be reversed and the matter remanded, so that evidentiary proceedings may be held at the trial level on the issues raised in this controversy.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-2283

District Court No. 90-547-CIV

CORNELL WILLIAMS, individually and as chair of the Orange County Political Coalition; JAMES JACKSON, individually and as correspondence secretary for the Committee of Organized Groups ("COG"); WARDELL SIMS and JAMES Q. MITCHELL, individually and as past presidents of the Coalition, on behalf of themselves and all others similarly situated to them in their individual capacities; and the aforementioned unincorporated associations,

Plaintiffs-Appellants,

versus

THE ORANGE COUNTY, FLORIDA, BOARD OF COUNTY COMMISSIONERS, including Commission Chair Hal Marston, former Commission Chair Tom Dorman, and Commissioners Linda Chapin, Vera Carter, and Bill Donegan, and their employees, assignees, and successors in office; BETTY CARTER, supervisor of elections, Orange County, Florida,

Defendants-Appellees.

Apppeal from the United States District Court
for the Middle District of Florida

Before FAY, DUBINA, and CARNES, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel,

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 28, 1992
For the Court: Miguel J. Cortez, Clerk
By: /s/ Karleen McNabb
Deputy Clerk
ISSUED AS MANDATE: Mar. 9, 1993

(This was stamped as being filed on its front page, p.1a here, U.S. Court of Appeals, Eleventh Circuit **Dec. 28 1992** Miguel J. Cortez, Clerk.)

CORNELL WILLIAMS, individually and as chair of the Orange County Political Coalition; JAMES JACKSON, individually and as correspondence secretary for the Committee of Organized Groups ("COG"); WARDELL SIMS and JAMES Q. MITCHELL, individually and as past presidents of the Coalition, on behalf of themselves and all others similarly situated to them in their individual capacities; and the aforementioned unincorporated associations,

Plaintiffs-Appellants,

versus

THE ORANGE COUNTY, FLORIDA, BOARD OF COUNTY COMMISSIONERS, including Commission Chair Hal Marston, former Commission Chair Tom Dorman, and Commissioners Linda Chapin, Vera Carter, and Bill Donegan, and their employees, assignees, and successors in office; BETTY CARTER, supervisor of elections, Orange County, Florida,

Defendants-Appellees.

No. 92-2283.

United States Court of Appeals, Eleventh Circuit.

Dec. 28, 1992.

Appeal from the United States District Court for the Middle District of Florida, James L. Watson, Judge, Sitting by Designation.

Before FAY, DUBINA, and CARNES, Circuit Judges.

PER CURIAM:

This appeal stems from a lawsuit brought by a plaintiff class composed of "all black citizens of Orange County, Florida, who were or could have been eligible to vote since 1980," against Orange County, Florida, and other defendants. The lawsuit, brought under the Voting Rights Act of 1965, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments of the United States Constitution, challenged the system of county government which consists of six commissioners elected from single-member districts and one chairperson elected at large. The district court granted summary judgment for the defendants.

We affirm based on the findings and reasoning contained in the district court's opinion, 783 F. Supp. 1348 (M.D. Fla. 1992), all of which we adopt, except for the dictum contained in the first full paragraph on page 1362 of that opinion.

AFFIRMED.

- This decision was published as Williams v. Orange County, Florida, 979 F.2d 1504 (11th Cir. 1992).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CORNELL WILLIAMS, et al.,
Plaintiffs,
v. CASE NO. 90-547-Civ-Orl-19

ORANGE COUNTY, FLORIDA,
Defendant.
_____/

ORDER

Plaintiffs Cornell Williams et al., move the Court pursuant to Fed.R.Civ.P. 59 to alter or amend its judgment in this case. After due deliberation, it is ORDERED, that plaintiffs' motion is DENIED.
Done and Ordered this 26th day of February, 1992.

/s/ James L. Watson
United States District Judge
(Sitting by Designation)

(This was stamped FILED 92 FEB 26 PM 2:21, Clerk, U.S. District Court, Middle District of Florida, Orlando, Florida)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISON

D.C. DOCKET NO. 90-547-CIV-ORL-19

CORNELL WILLIAMS, (et al.),
versus
ORANGE COUNTY, FLORIDA,

JUDGMENT IN A CIVIL CASE

[__] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[xx] **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED and adjudged that defendant's motion for summary judgment is granted; Judgment is entered in favor of the defendant, Orange County, and against the plaintiffs Cornell Williams, et al..

Feb. 3, 1992
Date

David L. Edwards
Clerk
/s/ Cindy Burgess
(By) Deputy Clerk

CORNELL WILLIAMS, et al.,
Plaintiffs,
v.
ORANGE COUNTY, FLORIDA,
NO. 90-547-Civ-Orl-19
United States District Court,
M.D., Florida, Orlando Division,
Jan. 31, 1992.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 56(f)

WATSON, District Judge (sitting by designation).

This is a civil rights action brought under the Voting Rights Act of 1965, and the Fourteenth and Fifteenth Amendments of the United States Constitution. In 1988, the electors of Orange County approved a new form of county government under which six county commissioners are elected from single-member districts and one commissioner who serves as chairperson is elected at large. The chair person has both legislative and executive powers. The system is referred to herein as the "6-1" system.

The plaintiffs have been certified as the class of "all black citizens of Orange County, Florida, who were or have been eligible to vote since

1980." They allege that the 6-1 system was enacted with the purpose and effect of diluting the voting power of black electors.

This case is before the Court on defendant Orange County's motion for summary judgment pursuant to Rule 56(c) Fed. R.Civ.P. Plaintiffs oppose the motion and move the Court under Rule 56(f) Fed. R.Civ.P. for additional discovery.

This Court has jurisdiction pursuant to 28 U.S.C. §§1331, 1343, and 42 U.S.C. § 1973. Plaintiffs motion under Rule 56(f) is DENIED, and defendant's motion for summary judgment is GRANTED.

The Court, after looking at all the material in the case from the point of view most favorable to plaintiffs, finds nothing beyond the unsupported opinions of plaintiffs to suggest that the adoption of the "6-1" system of election for the Orange County government violated the rights of black voters under the U.S. Constitution or the Voting Rights Act of 1965. Plaintiffs have not come forward with any evidence which would place in factual dispute the proposition abundantly supported by affidavits, that the "6-1" system was not intended to dilute the black vote and does not in fact operate to dilute that vote.

The 1990 Census now makes it clear that one of the six districts can be drawn so as to have a black voting age majority. This eliminates one of Plaintiffs' original claims. In addition, it is clear that the rights of black voters are not diluted with respect to the at-large election of one County Chairman. Plaintiffs have failed to raise a genuine issue of fact to challenge the persuasive evidence that in elections which are countywide in Orange County, the white voting majority does not vote as a bloc so consistently that it usually defeats the preferred candidate of black electors. Plaintiffs have entirely failed to create any genuine issue as to the correctness of the expert opinion that in county-wide elections since 1980 the voting preferences of black voters have found strong and meaningful expression.

BACKGROUND

In November of 1986, the electors of Orange County approved a new home rule charter, which became effective on January 1, 1987. At that time, Orange County commissioners were elected in at-large elections from five residency districts. Section 203 of the Charter provided that "a proposition calling for single-member representation within the Commission districts shall be submitted to the electors of Orange County at the general election to be held in November, 1988." Section 702 provided for the appointment of a Charter Re-

view Commission ("CRC") by the Board of County Commissioners ("BOCC") to conduct a comprehensive study of county government and to make proposals for amendments or revisions to the Orange County Charter. Defendant's Motion for Summary Judgment, Docket Number 79, Appendix A, Affidavit of Betty F. Carter, at 3, and Orange County Charter, attached thereto as exhibit 1.

The CRC was created in August 1987 by resolution of the Board of County Commissioners. Id. The resolution provided that "Any proposed amendments or revisions to the Charter shall be placed on the ballot without the approval of the Board of County Commissioners of Orange County Florida." Carter Affidavit, exhibit 2, at 2.

At a meeting on July 15, 1988, the CRC voted (thirteen to two) in favor of placing two propositions on the ballot, worded as follows:

PROPOSITION 1

Single-Member County
Commission Districts

"Shall the five (5) members of the Orange County Commission of Orange County, Florida, be elected to the office from single-member districts by electors residing in each of those districts only?"

PROPOSITION 2

Orange County Charter Revision Providing for Six (6) Single-Member Districts, County Chairman, and Other Provisions

"Shall the Orange County Charter be revised increasing the number of County Commissioners from five (5) to six (6); providing for election of each commissioner only by the voters in their commission district; creating the office of County Chairman elected by all county voters and limited to two consecutive terms; specifying legislative and executive functions, powers and duties; revising the initiative process; allowing municipal ordinances to prevail over county ordinance [sic] and making other technical and related changes?" Carter Affidavit, at 4.

Subsequent to approving the ballot issue, the CRC obtained a legal opinion to the effect that if both propositions passed, the result would be the same as if proposition one failed and proposition two passed. Carter Affidavit, at 5. Both propositions were submitted to the public at the 1988 general election. Both received a majority of the votes cast. Defendant's Motion for Summary Judgment, Appendix F, Official Cumulative Report, Orange County--General Election November 8, 1988, at 2, 3. The interpretation of counsel for the CRC was upheld after litigation in state court.

The present 6-1 system is the result.

Plaintiffs allege that the 6-1 system dilutes local black voting strength in two ways: by limiting choice for the minority to a legislative office downgraded by the enhancement of the powers of the at-large chairperson, and by limiting the choice of blacks to one of six legislators elected from single-member districts while allowing whites to select two legislators--one from each of their respective election districts and another filled by at-large election in which the black voters of Orange County will have little influence. Pre-Trial Stipulation, Plaintiffs' Contentions, Docket Number 66, at 13.

Defendant moves for summary judgment, and asserts that there is no genuine issue of material fact that the 6-1 system was not adopted and is not being maintained with invidious intent to discriminate against blacks or to dilute the voting strength of black electors; that Orange County has not intentionally denied blacks the right to register to vote or to cast ballots; that with 1990 decennial census data it is possible to draw the boundaries of one black voting age majority district; and that since 1980, white bloc voting has not usually denied the opportunity to blacks to elect candidates of their choice. Defendant's Motion for Summary Judgment, at 2-3.

Plaintiffs respond with Plaintiffs' Motion Made Pursuant to Rule 56(e) and (f), F.R.Civ.P., Docket Number 87, requesting additional discovery prior to adjudication of defendant's summary judgment motion, and Memorandum of Law in Support of Class Plaintiffs' Motion Made Pursuant to Rule 56(e) and (f), F.R.Civ.P., And In Opposition To Defendants' Motion For Summary Judgment, Docket Number 88, addressing the substance of defendant's motion for summary judgment and requesting that the Court deny summary judgment.

PLAINTIFFS' RULE 56(f) MOTION

Plaintiffs' motion under Rule 56(f) requests the Court to defer consideration of defendant's motion for summary judgment and permit plaintiffs to take the depositions of Orange County attorney Tom Wilkes and defendant's expert Michael A. Magiotto and to file with the court "public documents and news reports to demonstrate past and present intentional racial discrimination."

Rule 56(f) states (")Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

The party opposing the motion for summary judgment by Rule 56(f) must state specific facts explaining its failure to respond to the motion for summary judgment with affidavits showing a genuine issue of material fact for trial. Barfield v. Brierton, 883 F.2d 923, 931 (11th Cir. 1989). That party may not simply rely on vague assertions that additional discovery will produce needed but unspecified facts, but must indicate how the stay will permit it, through discovery, to rebut the movant's contentions. Id. The grant or denial of continuance is within the sound discretion of the trial court. Id.

Plaintiffs' motion is supported only by the affidavit of the attorney for the class, Gabe Kaimowitz. In the affidavit, Mr. Kaimowitz states while preparing for depositions that were taken in late October, 1991 he learned of Mr. Wilkes' role in "preparing the way" for the 6-1 system, including

the fact that he served as chairperson of the Citizens' Charter Government Study Committee ("CCGSC"). However, Mr. Wilkes is identified as Chairman of the CRC in a copy of the Orange County Charter filed with this Court on August 30, 1990, as an exhibit to the Affidavit of Judge Claude R. Edwards Circuit Judge, retired (Fla.), Docket Number 43. Yet Mr. Kaimowitz did not attempt to contact Mr. Wilkes concerning a deposition until three days before the November 1, 1991 close of discovery. The Court concludes that Mr. Kaimowitz had ample time to depose Mr. Wilkes and failed to avail himself of the opportunity. Moreover, Mr. Kaimowitz does not indicate in his affidavt how the deposition of Mr. Wilkes would allow him to rebut defendants' motion for summary judgment.

The Kaimowitz affidavit also states that Mr. Kaimowitz did not become aware that defendants had retained an expert to perform an ecological regression analysis of voting patterns in Orange County until October 30, 1991, and submits a copy of defendant's supplemental response to interrogatories number 30 and 36 bearing that date. In view of the strategetic timing of the supplemental response, it is not surprising that plaintiffs were unable to depose the expert, Dr. Maggiotto.

Mr. Kaimowitz states that given the opportunity to depose Dr. Maggiotto, he would

inquire into Dr. Maggiotto's training and expertise in the use of statistics, the justification for the statistical methods Dr. Maggiotto employed in his analysis, and the basis and effect of Dr. Maggiotto's statement that in the 1990 county commission election for district 6, Mable Butler, a Democrat black female defeated Edward N. Rodriguez, a Republican white male.

The Court concludes that the inquiries that Mr. Kaimowitz would have posed to Dr. Maggiotto would not lead to evidence indicating the existence of a genuine issue of material fact. Dr. Maggiotto is a professor of political science and chair of the political science department of Bowling Green State University. He holds a Ph.D. in political science, and specializes in the study of American political behavior and the use of statistical techniques, including regression analysis, to analyze the behavior of the electorate. He has testified as a voting rights expert in Federal District Courts twice previously, and once in State Court. Affidavit of Michael A. Maggiotto, 1-3. The Court finds that there is no genuine issue of Dr. Maggiotto's competence to apply the statistical methods required in this case, and no likelihood that a deposition would raise such an issue.

The statistical methods employed by Dr. Maggiotto, bivariate ecological regression analysis and homogenous precinct analysis, were relied upon by the Supreme Court in Thornburg v. Gingles,

478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), and have been used thereafter in many voting rights cases. E. g. Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1558 (11th Cir. 1987). The Court concludes there is no likelihood that plaintiffs could raise a genuine issue of the reliability or legal sufficiency of these methods by deposing Dr. Maggiotto.

Mr. Kaimowitz also asserts that he would explore the "error" that Dr. Maggiotto made in referring to Edward N. Rodriguez, the 1990 Republican candidate for county commission district 6 as white, when he is Hispanic. Defendant in response submits the affidavit of Mr. Rodriguez, who states therein that he is white and of Hispanic origin. Defendant's Response In Opposition to Class Plaintiffs' Motion Made Pursuant To Rule 56(e) and (f), F.R.Civ.P., Docket Number 93, Exhibit A. The Court takes judicial notice that is possible to be both white and of Hispanic origin, and concludes that plaintiffs would not be able to raise a genuine issue of fact material to this case by deposing Dr. Maggiotto concerning the race of Mr. Rodriguez.

More important, however, the plaintiff class has utterly failed to give reasons why it cannot come forward with affidavits indicating the existence of a genuine issue of material fact concerning the occurrence of white bloc voting. The statistical methods used by the defense expert are endorsed by case law available to and cited by

plaintiffs, and the Orange County voting data it is applied to is a matter of public record. If plaintiffs dispute the use of these methods or data, they have had the opportunity to make the basis for this contention known to the Court and have not done so. Plaintiffs have employed experts of their own in this case[1]. The Court will not speculate about why plaintiffs did not submit the affidavits of those or other experts on these issues. Plaintiffs' lack of access to defendant's expert does not excuse their own failure to submit any affidavits on this essential element of their case in response to defendant's motion for summary judgment.

Plaintiffs' Rule 56(f) motion states that they wish the Court to receive public documents and news reports before summary judgment is considered. Plaintiffs' Motion Made Pursuant to Rule 56(e) and (f), at 2. The motion does not specify any documents beyond those appended thereto.

1--Plaintiffs submitted the affidavit of Professor Mark Stern, a professor of political science, in support of their application for preliminary injunction. See Docket #38. This affidavit asserted that blacks in Orange County tend to vote for black candidates, and that six single-member county commissioner districts would not be a sufficient number to create a black majority district. This contention is now moot. The affidavit does not address the question of white bloc voting.

In view of the public nature of the documents, it is obvious that additional discovery would serve no purpose with respect to them. To the extent that the documents that plaintiffs refer to are admissible under Rule 56, there is no reason that they could not have been submitted with their opposition to defendant's motion for summary judgment. The Court therefore will not defer consideration of the motion for summary judgment on that basis.

This case was filed on July 23, 1990. The first interrogatories were served by defendants in September, 1990. Discovery closed on November 1, 1991. Defendant's motion for summary judgment was filed on November 15, 1991. The parties were advised by order of the Court on December 5, 1991 (Docket Number 85) that they would have until December 20 to file affidavits and other documents within the purview of Rule 56 and that failure to oppose the motion may result in judgment for movants without further proceedings.

Plaintiffs have given no reason why, in more than one year of discovery and one month from the filing of the motion for summary judgment, they could not procure affidavits going to the elements of their case. No reason appears why plaintiffs were less able than the defendant to locate individuals who were involved in the political processes leading to the adoption of the 6-1

system and secure their affidavits, or to secure an expert analysis of the public voting records. As a result, the Court concludes that no additional period of discovery is warranted before considering the motion for summary judgment.

Plaintiffs' motion made pursuant to Rule 56(f) is denied. Plaintiffs' Motion Pursuant to Rule 56(e) and (f) F.R.Civ.P., and Memorandum of Law in Support of Class Plaintiffs' Motion Made Pursuant to Rule 56(e) and (f), F.R.Civ.P., And In Opposition To Defendants' Motion For Summary Judgment, and the accompanying affidavit address the merits of defendant's motion for summary judgment and request that the Court deny summary judgment. The Court now proceeds to adjudicate that motion.

SUMMARY JUDGMENT

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c). In determining if a factual issue exists, a court must consider all of the evidence in the light most favorable to the non-moving party. Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987). The Rule mandates the entry of summary judgment upon motion, after adequate

time for discovery, against a party who fails to making a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 273 (1986). Rule 56(e) requires the nonmoving party to go beyond the pleadings and by its own affidavits or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." Id.

CONSTITUTIONAL CLAIMS

In order to prove at trial that the 6-1 system dilutes the votes of blacks in violation of the Fourteenth Amendment, plaintiffs must show that it was "'conceived or operated as [a] purposeful device to further racial discrimination' by minimizing, canceling out or diluting the voting strength of racial elements in the population." Rogers v. Lodge, 459 U.S. 899, 1083 S.Ct. 198, 74 L.Ed.2d 160 (19820, quoting Whitecomb v. Chavis, 403 U.S. 124, 142, 91 S.Ct. 1958, 1877, 29 L.Ed.2d 363 (1971)(emphasis added). To prevail on the claim under the Fifteenth Amendment, plaintiffs must show a purposeful denial of the right to register or cast ballots. Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 1498-99, 64 L.Ed.2d 47 (1980). Nowhere do plaintiffs allege that they have been denied the right to register or cast ballots.

Defendants have convincingly demonstrated that the 6-1 system was not created and is not operated for a discriminatory purpose. Plaintiffs have failed to respond with any fact indicating the existence of a genuine issue with respect to intentional discrimination.

Plaintiffs' complaint refers to a "smoking gun" indicating tht the 6-1 system was intentionally created to dilute the voting power of minorities in Orange County. Plaintiffs' Verified Complaint For Declaratory And Injunctive Relief For A Proposed Class In A Civil Voting Rights Action, Docket Number 1, at 12. The "smoking gun" is a letter to the Orlando Sentinel written by the chairman of the Orange County Democratic Executive Committee ("OCEC") in 1988. In the letter, Mr. Pugh notes that the OCEC supported the creation of seven single-member districts for county commissioners. He points out that the 1986 charter provision calling for a referendum on single member districts did not mention the idea of a "strong mayor,' and states that at public hearings, "no cry for a strong mayor was heard." He then states, "(b) a slim majority within the Charter Commission, the long awaited single member districts are being bonded to the questionable proposal for a County Executive. And that slim majority will not let the rest of us vote on the issues we want to vote on. Nobody will be

allowed, (if the current proposal stands), to vote for the districts without voting simultaneously for the mayor. This is unfair to the voters. It is especially unfair to those minority communities never represented on the county commission." Defendant's Motion for Summary Judgment, Appendix F, Affidavit of Irby Pugh, Exhibit 2.

It is evident that the proposal referred to in the letter did not stand. As submitted to the electorate, the charter referenda did separate the 6-1 system from a pure single-member district system. Furthermore, a fair reading of the letter reveals that Mr. Pugh criticizes the unfairness of the proposal, but does not impute any discriminatory motive to the CRC or anyone else. Indeed, in an affidavit submitted by defendant, Mr. Pugh states that "My letter to the Orlando Sentinel was not meant to suggest or imply that those individuals who advocated the 6-1 system had any intent, motivation or purpose to dilute the voting strength of blacks in Orange County." Pugh Affidavit at 3.

The CRC consisted of fifteen members appointed by individual county commissioners. Carter Affidavit, at 4. Two of the members of the CRC, Wilbur Gary and Ronald Rogers, are black. Defendant's Motion for Summary Judgment, Appendices C and D, Affidavits of Wilbur Gary and Ronald O. Rogers.

Mr. Gary stated the following: The CRC began its deliberations in September, 1987. Its initial meetings focused upon organization, staffing and identification of issues. From the outset, it was his intention to work for a system of county government that would assure that at least one black commissioner would be elected to the Board of County Commissioners. He was in favor of an all single-member district system, without firmly advocating any particular size. Between January and May 1988, he recalls expressing an interest in seven and nine member single-member district systems, including some which included one at-large member. He recalls members of the county commission in early 1988 testifying before the CRC that an all single member district system would not work because it would place too much pressure on district commissioners and would result in ward politics. Representatives from local governments advocated a strong chairperson, and expressed the need to have an effective leader in charge of county government. Elected black officials and administrators from other Florida counties also appeared and testified about the need to have single member districts to provide for minority representation on the county commission.

Mr. Gary states that in his opinion, the issues surrounding the single-member districts, the size of the county commission and the strong

chairperson position were the most important issues before the CRC. These issues dominated the debate and discussion of the CRC from early 1988 until the final vote in July, 1988. Initially, the county chairperson position was put forward as one with extraordinary powers, including a veto over legislation passed by the BOCC. However, through a series of votes by the CRC, the powers of the position were progressively diluted, although the strong chairperson still retained the power to oversee the administration of county government. Mr. Gary was opposed to the chairperson concept as originally proposed because he believed that it had too much power. As the powers were progressively diluted and modified, the concept became more acceptable to him.

In the end, Mr. Gary voted for the 6-1 system because he believed it was the best compromise between those who wished to enhance the opportunity for minority representation on the BOCC and those who wanted the greater leadership and accountability of the strong chairperson. As he recalls, there was no member of the CRC who did not favor some type of single member district system, as each appeared to acknowledge its desirability as a means to provide for minority representation on the BOCC. During the ten months of deliberations, Mr. Gary reports that he never heard any CRC member make any disparaging or

discriminatory remarks, or heard any member state or imply that he supported election of a chairperson from the at-large seat because of a desire to dilute the influence of a black county commissioner, to disenfranchise blacks, or otherwise dilute the voting power of blacks in Orange County. Nor does Mr. Gary recall any suggestion from members of the public that the chairperson should be elected county-wide to prevent a black from being chairperson. Affidavit of Wilbur Gary.

Mr. Gary concludes by saying "(a)fter reflecting about the deliberations of the CRC, I have no reason to believe or even suspect that the CRC voted in favor of the 6-1 system in order to discriminate or dilute the vote of black electors in Orange County. To the contrary, in my opinion, the CRC voted for six single-member districts in order to concentrate or intensify the voting strength of blacks which would make it easier to elect a black to the county commission. In fact, as I recall, the word in the black community was that the 6-1 system would finally allow the election of a black candidate to the county commission." Gary Affidavit, at 4.

Mr. Rogers affidavit corroborates that of Mr. Gary. He states that the representatives of Orange County municipalities recommended a strong chairperson, and that elected officials, members

of the black community, and black officials from other jurisdicitons testified in favor of a single member district system. He indicates that the majority of the CFC did not favor increasing the number of commissioners to nine, and there was substantial concern about ward politics under such a system. Similarly, Mr. Rogers perceived a significant number of citizens who wanted the accountability and leadership of a county chairperson. About half of the public that appeared during hearings supported the chair person or "mayor" system, particularly business leaders and elected officials. Mr. Rogers viewed the 6-1 system as a good compromise between the viewpoints of the black community and those favoring a strong chair. Consequently he voted for the 6-1 proposal. Mr. Rogers states "(a)t no point do I recall any CRC member expressing any interest or intent to dilute the voting power of blacks or otherwise discriminate against blacks. In fact, the opposite was true. The desire of the CRC appeared to be to increase black voting strength by providing for six single-member districts. I believed that such a system represented a substantial improvement over the former five at-large district commission." Affidavit of Ronald O. Rogers.

It is clear from these affidavits that the 6-1 system developed through an open and democratic process free from bias or prejudice and any intent to discriminate against the plaintiff class.

In the deposition of representative plaintiff Cornell Williams, Mr. Williams stated that he had attended three meetings of the CRC. Defendant's Motion for Summary Judgment, Volume I, Appendix K, Deposition of Cornell Williams, at 32. When asked if he saw or heard anything taking place during the hearings he attended that suggested that the CFC would act with the purpose of discriminating against blacks or diluting black voting strength, he replied, "I did not hear or see anything that indicated that, but my experience with at-large election indicated that at-large itself would dilute black vote." Williams Deposition, at 42. He further stated that no one else had ever told him of any occurrence at CRC meeting that would lead him to believe that the CRC intended to discriminate. Williams Affidavit, at 43. His deposition makes clear that his belief is based solely upon the recommendation of the CRC to place the 6-1 system on the ballot.

Representative plaintiff James Mitchell also indicated that he had never heard any of the CRC members say anything that would lead him to believe that the CRC acted with racially discriminatory intent. Defendant's Motion for Summary Judgment, Volume I, Appendix L, Deposition of James Mitchell, at 32. Like Mr. Williams, it is clear from his deposition that his

belief is based solely upon the fact that the system was recommended for the ballot by the CRC. Mitchell Affidavit, 33 et seq.

Similarly, representative plaintiff James Jackson stated that he had attended at least one CRC meeting and had neither seen nor heard of any activities of the CRC that suggested a discriminatory motive, other than the adoption of the 6-1 proposition. Defendant's Motion for Summary Judgment, Volume I, Appendix M, Deposition of James Jackson, at 28-29.

Mr. Wardell Simms, (sic) also a representative plaintiff, stated in deposition that the form of the ballot propositions, and a newspaper report in the Orlando Sentinel at the time of the election that "one cannot win unless you vote for both of them," supported the charge of intentional discrimination. Defendant's Motion for summary Judgment, Volume I, Appendix N, Deposition of Wardell Simms, at 16-17. He stated that he had attended 'several" of the CRC meetings, Id., at 19, and indicated that he did not hear any of the members of the CRC say anything that suggested that the 6-1 system was being proposed with the intent to discriminate against blacks. Id., at 26. He observed, however, that the CRC allotted time more generously to those speaking in favor of the 6-1 system than those who opposed it. Id., at 27.

The Court concludes from the depositions of the representative plaintiffs that they possess no evidence sufficient to raise a genuine question of discriminatory intent in the adoption or maintenance of the 6-1 system. All four representative plaintiffs attended CRC meetings, and only one of the four noticed any activity which he perceived as indicative of a discriminatory intent. Further, that activity (granting more time to speakers who favor the 6-1 system) indicates a preference for the 6-1 system, and does not of itself indicate any racial motive.

While Mr. Simms did not indicate the date of the Sentinel article that he referred to in his deposition, plaintiffs have submitted an Orlando Sentinel article published the week before the 6-1 referendum in support of another motion in this case. The articles states "(i)f voters say no to both options, the commission would stay as it is, with all members elected countywide.

"But when it came time to explain the choices to voters, commissioners decided they would publish a pamphlet explaining the options instead of letting the charter review committee do it. That is when the latest trouble started. The pamphlet, sent out last week, said that voters had to say yes to both options if they wanted a county mayor. That was wrong: Voters can say no to the first question and yes to the second and still ap-

prove the county mayor idea." Memo of Law in Support of Plaintiffs' Motion to Disqualify Thomas J. Wilkes, Esq., as an Attorney of Record in These Proceedings, Exhibit C. Even assuming arguendo that another article had erroneously stated that a vote for both propositions was required to approve the 6-1 system, this article was obviously written in part to clear up the confusion. Moreover, the confusion favored the adoption of the five single-member districts, not the 6-1 system. The Court thus determines that plaintiffs have made no showing that they possess any evidence to indicate that the Orlando Sentinel misinformed the Orange County electorate in order to discrminate against black voters.

Because the 6-1 proposal orginated with the CRC and passed directly to the ballot without the approval of the BOCC, evidence unrelated to to this process is irrelevant to the claim of intentional discrimination. Defendant has shown that there is no genuine issue of intentional discrimination in the creation and operation of the 6-1 system, and plaintiffs have failed to rebut that showing.

VOTING RIGHTS ACT

Section 2 of the Voting Rights Act as amended, states "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in

"a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

"(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered. Provided, That nothing in this section established a right to have members of the protected class elected in numbers equal to their proportion in the population."

In Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court provided an extended analysis of the statute. After a discussion of the nature of the proof required to establish a § 2 violation as elaborated in the legislative history, the Court stated that the

circumstances under which such a violation may be proved are limited in three ways. "First, electoral devices such as at-large elections may not be considered per se violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it." Gingles, 478 U.S. at 46, 106 S.Ct. at 2764 (citations omitted).

More specifically, the use of multimember districts generally does not violate § 2 absent the conjunction of three preconditions: "First the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district... Second, the minority group must be able to show that it is politically cohesive....Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, such as the minority candidate running unopposed... usually to defeat the minority's preferred candidate." Gingles, 478 U.S. at 505-1, 106 S.Ct. at 2766-67 (citations omitted).

The election districts at issue in Gingles differed from the 6-1 system at bar in that all of the representatives from the contested districts were elected at large. Nevertheless, the Gingles preconditions apply to the plaintiffs' § 2 claim of voting power dilution based upon the downgrading of the powers of the single-member district commissioners and the inability of blacks to elect the at-large chairperson. See Houston Lawyers' Assn. v. Attorney General of Texas, 501 U.S.---, 111 S.Ct. 2376, 115 L.Ed.2d 379 (1991); see also Dillard v. Crenshaw County, 649 F. Supp. 289, 293, (M.D. Ala. 1986), affd, 831 F.2d. 246, 251-3 (11th Cir. 1987).

At the outset of this action, plaintiffs asserted that no black voting age majority district could be drawn under the 6-1 system and sought an order requiring seven single-member districts. Subsequently, the results of the 1990 decennial census have become available. Notwithstanding their failure to stipulate to the fact, the parties have conceded that district six can now be drawn to create a district with a black voting age majority. Pre-Trial Stipulation, plaintiffs' contentions, at 6 ("Blacks do form a majority in one election district under any of the Commission redistricting plans being seriously considered"); Memorandum in Support of Defendant's Motion for Summary Judgment, at 6. Plaintiffs' claim that the 6-1 system does not allow such a district is thus moot.

Defendants assert that there is no genuine issue concerning the fact that the white majority in Orange County does not vote sufficiently as a bloc to enable it usually to defeat the black preferred candidate. In support of its motion, Orange County submits the affidavit of Dr. Michael Maggiotto, an expert in statistical analysis of voting data, whose qualifications are discussed supra. Dr. Maggiotto examined the Orange County voting and registration records for all of the contested County Commission races from 1980 to 1990, Defendant's Motion for Summary Judgment, Volume II; all of the contested county offices involving black candidates opposing Anglo-white candidates from 1980-1990; and the 1988 Charter referenda issues. Affidavit of Michael A. Maggiotto, Defendant's Motion for Summary Judgment, Appendix H, at 3.

Dr. Maggiotto analyzed this data using two independent statistical methods, homogenous precinct analysis and ecological regression analysis. These methods were utilized in the Gingles case, and are accepted by this Court. Dr. Maggiotto's analyses yielded measures of the percentage of black support and white support for the candidates or issues in these elections summarized in the appendices to this opinion.

From his analyses, Dr. Maggiotto found the following: "Between 1980 and 1990, there was a candidate favored by a majority of black electors in 10 out of 13 county-wide Democratic primary and run-off elections for the office of County Commissioner. In 8 of these 10 elections, the candidate preferred by at least a majority of black electors won. In three of the thirteen elections, no candidate received a majority of black votes.

In county-wide general elections for county commission during the same period, candidates favored by at least a majority of black electors won 6 out of 14 contests. In addition, in the 1980 election for district 3, the black majority preferred candidate lost by 0.27% of the total vote. In 1988, the black majority preferred candidate lost by 0.13% of the total vote. In 1990, the winner of the county-commission chair elected at large was Linda Chapin, who was preferred by at least a majority of black electors. The results indicate that Ms. Chapin would not have won without the votes of black electors.

In each of the county-wide general election contests between 1980 and 1990, at least 90 percent of the black electors voted for the Democratic party candidate. In 1990, in the county commission district six election, Democrat Mable Butler, a black female, defeated a Republican

white male.[2] This was a district, rather than county- wide election.

From the foregoing, Maggiotto Affidavit, at 4-5, Dr. Maggiotto opined, Id., at 6, "These results show that it is not the case in Orange County, Florida that County Commission candidates favored by at least a majority of black electors are usually defeated by white bloc voting strength. Quite the contrary, these results show that within the Democratic party, the candidates favored by at least a majority of black electors win most elections. Second, these results show that in general elections, black electors vote overwhelmingly for the Democratic party candidate, and that whenever the Democratic party candidate of choice wins. the black candidate of choice wins. Third, these results indicate that the Democratic party candidates for County Commission won 6 out of 14 county-wide general elections, or 43 percent of the contests, and in two more of these races, the Democratic party candidates came within three-tenths of one percent of winning. Thus, on average, Democratic party candidates typically supported by large majorities of black electors--have roughly an even chance of winning county-wide general election contests for the County Commission in Orange County, Florida."

2. The Republican white male who defeated Mable Butler in district six is Edward Rodriguez, a white male of Hispanic origin.

Dr. Maggiotto noted that with the exception of Ms. Butler's 1990 election to the BOCC, no black candidates ran for county commission between 1980 and 1990. Maggiotto Affidavit, at 6. While acknowledging that significant differences between elections for different offices generally limit the probative value of data from elections for offices other than those at issue, Dr. Maggiotto presented the results of his analyses of county-wide elections in Orange County for school board and county judge in which a black candidate faced a white candidate as follows:

Between 1980 and 1990, there were 7 county-wide elections in which a black candidate ran against one or more white candidates where a nomination was at stake. Six were county-wide primary or run-off elections for school board, and one was a county-wide non-partisan election for judge. In each election, the black candidate received at least a majority of the black electors' votes. The black candidate won six of these seven elections, including the 1980 Republican primary for School Board District 5, in which Kattie Adams, a black female, defeated a white male.

In the same period, there were 8 countywide elections in which a black candidate ran against one or more white candidates where the outcome determined who would occupy the office. Five of

these elections were contests for the school board and three were for judge. In each of these races the black candidate received at least a majority of the black electors' votes. The black candidates won four of these eight elections.

Each general election defeat of a black school board candidate involved a victory for a Republican party candidate. Ms. Adams won the 1980 primary and general school board elections because she receives majorities of the black and white votes. In 1988, Ms. Adams ran against James Mitchell, a black male who had run unsuccessfully for the school board in 1980 and 1984. A majority of white electors favored the Republican candidate Adams, and a large majority of the black electors favored the Democratic candidate Mitchell, although there was more cross-over voting than is typical.

Dr. Maggiotto concluded that in general elections in which a black candidate successfully ran against a white candidate, approximately fifty percent of the white electors voted for the black candidate. Black candidates won ten out of fifteen of the local county-wide elections in which they participated in Orange County since 1980, and the candidates preferred by at least a majority of blacks were not typically defeated by white bloc voting.

Dr. Maggiotto also reviewed election data from the 1988 Charter referenda. He concluded that a majority of black electors favored adoption of both referenda, and both referenda passed. Further the black electors favored passage of both measures by larger majorities than white electors, and the fall-off in support of black electors for the second issue was proportionally the same as the fall-off in support of white electors for the second ballot issue.

Plaintiffs characterize this expert's affidavit as "quite deceiving and in material respects contrary to law and facts." Plaintiffs' Memorandum of Law, Docket Number 88 at 14. Plaintiffs argue that Dr. Maggiotto's conclusions are erroneous because he referred to Mr. Rodriguez, one of the opponents of Mabel Butler as a "Republican white male" without noting Mr. Rodriguez' Hispanic origin. Plaintiffs cite Meek v. Metropolitan Dade County, 908 F.2d 1540 (11th Cir. 1990), for the proposition that "the Latino population is not said to be statistically insignificant."

In Meek, blacks and Hispanics brought suit alleging a violation of the Voting Rights Act. In contrast in this case, no indication of polarized voting with respect to Hispanic origin is before the Court. Moreover, in 1990, 46.8% of the registered voters of district six were black. Defendant's Motion for Summary Judgment,

Appendix G. Ms. Butler received 11,630 votes, more than twice the 5,430 votes cast for Mr. Rodriguez. Viewed in the light most favorable to plaintiffs, the Court is unable to conclude that Ms. Butler won the 1990 district six county commission election due to the "special circumstance" of Mr. Rodriguez's ethnicity.

In addition, defendant has submitted a supplemental affidavit from Dr. Maggiotto, in which he states, "Mr. Rodriguez's race and ethnicity is immaterial to the opinions and conclusions I reached in my affidavit with regards to the opportunity black electors have had in Orange County to elect candidates of their choice to at-large positions. This is because my opinions were based on the success rate black electors have had since 1980 in electing county commission candidates of their choice to the county commission as well as the success rate in electing black candidates for other county offices who ran county-wide." Defendant's Response In Opposition To Class Plaintiffs' Motion Made Pursuant to Rule 56(e) and (f), F.R.C.P., Exhibit C, Supplemental Affidavit of Michael Maggiotto, at 2.

Plaintiffs argue that the evidence of county commission elections in which no black candidate ran should not be considered. In Gingles, 478 U.S. at 67-68, 106 S.Ct. at 2774-75, Justice Brennan,

writing for a plurality of the Court, states, "First, both the language of § 2 and a functional understanding of the phenomenon of vote dilution mandate the conclusion that the race of the candidate is irrelevant to racial bloc voting analysis....[T]he fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry. Under § 2, it is the status of the candidate as the chosen representative of a particular racial group, and not the race of the candidate that is important."

This plurality approach was adopted by the 11th Circuit in Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1556 (11th Cir. 1987) ("as a plurality of the Supreme Court have held, it is the race of the voter, not of the candidate, which is of concern in racial polarization claims.")

Notwithstanding this language in Gingles, the 5th Circuit in Citizens for a Better Gretna v. Gretna, 834 F.2d 496 (5th Cir. 1987), found that only elections in which black candidates had run could be considered in assessing the degree of racially polarized voting. "[I]mplicit in the Gingles holding is the notion that black preference is determined from elections which offer the choices of a black candidate. The various Gingles concurring and dissenting opinions do not consider

evidence of elections in which only whites were candidates. Hence, neither do we." Gretna, 834 F.2d at 503-4.

The Gretna approach was folowed in Bradford County NAACP v. City of Starke, 712 F. Supp. 1523, 1540 (M.D. Fla. 1989). While acknowledging that there is no binding precedent on this issue, Id. the Bradford County found support in the following passage from Solomon v. Liberty County, Fla., 865 F.2d 1566, 1573 (11th Cir. 1988): "Between these extremes, however, there will fall situations in which evidence of vote polarization and minority electoral failure is either inconclusive, insufficient, or unavailable due to a lack of minority candidacies. In these cases, the courts must rely on the full range of (')totality of circumstances(') inquiries to determine whether the challenged electoral system violates the Act."

The Solomon Court stated that this was recognized in Gingles when the Supreme Court noted, "The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. One important circumstance is the number of elections in which the minority group has sponsored candidates. Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to

the electoral process. Similarly, where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available does not foreclose a vote dilution claim." Gingles, 478 U.S. at 57, n. 25, 106 S.Ct. at 2769-70 n. 25.

This Court declines to follow Gretna and Bradford. The quoted passages from Solomon and Gingles do not compel the conclusion that elections in which black candidates did not run cannot be considered. On the contrary, evidence of the lack of black participation in elections in which there were no black candidates would be an important factor that would tend to prove unequal access to the electoral process. Conversely black participation in such elections is a circumstance relevant to whether the electoral system violates the Act.

Nevertheless, the Court concludes that if this case were a challenge to the five at-large commissioner system that the 6-1 system replaced, the affidavit of Dr. Maggiotto would be insufficient to meet the movant's burden on motion for summary judgment. However, the 6-1 system was developed with the participation of the black community and was proposed in part in an attempt to facilitate minority participation in county government. (*Eleventh Circuit disavowed ¶.*)

In Dillard v. Crenshaw County, Alabama, 831 F.2d 246, 250 (11th Cir. 1987), the Court considered the relation between a proposed remedy for a county election system in violation of the Voting Rights Act and the election scheme it was to replace: "The evidence showing a violation in an existing election system may not be completely coextensive with a proposed alternative. The nine factors suggested by Congress rely to a significant degree on a review of the history as tainted by the infirm election procedure. Additionally, a number of these factors are circumstances, not direct evidence of a lack of openness in the political process. Thus at-large procedures that are discriminatory in the context of one election scheme are not necessarily discriminatory under another scheme. The Supreme Court has repeatedly said that at-large procedures are not unconstitutional per se. Id. (citations omitted.)"

The decision of whether to govern Orange County by an all single-member district system or by the 6-1 system with its at-large chairperson was submitted to the voters. A majority of black voters, as well as white voters, chose the 6-1 system.

Under these circumstances, the facts that whites have not voted as a bloc so as to usually defeat the candidates preferred by blacks in Orange County commission races prior to the adoption of the 6-1 system, nor in Orange County school board and judicial races in which black candidates have run, indicate that the 6-1 system does not dilute the voting power of blacks in violation of § 2 of the Voting Rights Act. The additional facts that a black candidate has successfully run for county commission under the 6-1 system, and that the current county chairperson could not have been elected without the support of black voters bolster this conclusion.

In the face of affidavits demonstrating these facts, and fully cognizant of what they would be required to prove at trial, plaintiffs have failed to produce any substantial evidence raising a genuine issue for trial.

Defendant's motion for summary judgment is GRANTED.

All other pending motions are DENIED.

APPENDIX I

REGRESSION ESTIMATES OF RACIAL VOTING FOR COUNTY COMMISSION RACES IN ORANGE COUNTY, FLORIDA: 1980-1990

Race/ Total Party/Votes		WHITES Support	Adj R^{2*}	BLACKS Support	Adj R^2
1980 Democratic Primary					
District 1					
Carter	16,083	41.2	.12	30.2	.12
Thomas	14,781	35.0	.42	53.5	.42
Wagner	9,857	23.8	.10	16.2	.10
District 3					
Cook	8,305	23.2	.00	24.7	.00
Courtney	4,829	13.6	.01	15.9	.01
Spears	14,577	40.4	.06	48.5	.06
Turley	7,975	22.9	.21	10.8	.21
District 5					
Brown	3,508	8.8	.25	18.1	.25
Davis	10,709	30.4	.09	22.9	.09
Ingham	3,947	8.7	.27	18.1	.27
McCree	10,169	33.0	.28	10.8	.28
Oropeza	1,742	2.9	.66	14.9	.66
Swanson	5,776	15.1	.00	15.1	.00

Race/ Total Party/Votes		WHITES Support	Adj R^{2*}	BLACKS Support	Adj R^2
1980 Democratic Run-Off					
District 1					
Carter	27,578	67.2	.38	46.8	.38
Thomas	14,916	32.8	.38	53.2	.38
District 3					
Cook	14,415	42.1	.05	35.4	.05
Spears	20,465	57.9	.05	64.6	.05
District 5					
Davis	19,287	50.4	.21	70.4	.21
McCree	16,539	49.6	.21	29.6	.21
1980 General Election					
District 1					
Carter(D)	71,503	55.1	.63	94.5	.63
LaRue (R)	51,931	44.9	.63	5.5	.63
District 3					
Spears(D)	57,837	46.6	.70	95.8	.70
M'rst'n(R)	58,151	53.7	.70	4.2	.70
District 5					
Davis (D)	56,058	44.2	.68	94.2	.68
T'way (R)	62,771	55.8	.68	4.8	.68
1982 Primary Election					
District 2					
Clenney	1,607	5.3	.11	8.9	.11
Hedrick	5,656	17.5	.40	30.7	.40
Keith	6,634	22.3	-.01	22.7	-.01
Orr	2,249	8.7	.04	5.3	.04
Pins	12,441	46.1	.19	32.1	.19

Race/ Total Party/Votes		WHITES Support	Adj R^{2*}	BLACKS Support	Adj R^2
1982 Primary Election					
District 4					
Harrell	13,542	62.1	.69	70.4	.69
Rigante	7,437	31.1	.31	9.2	.31
Pruett	5,373	20.5	-.01	20.4	- .01
1982 Primary Run-Off					
District 2					
Keith	6,549	34.9	-.01	34.7	- .01
Pins	12,245	65.1	-.01	65.3	- .01
1982 General Election					
District 2					
Pins (D)	47,711	43.1	.81	92.5	.81
D'rm'n(R)	52,742	56.9	.81	7.5	.81
District 4					
H'rr'll(D)	61,201	62.1	.69	94.4	.69
Rod'z (R)	33,290	37.9	.69	5.6	.69
1984 Primary Election					
District 1					
Carter	21,780	64.6	-.00	67.2	-.00
Wagner	10,313	35.4	-.00	32.8	-.00
District 3					
Poole	15,636	52.2	.22	66.0	.22
Trivett	12,999	47.8	.22	34.0	.22
1984 General Election					
District 1					
C'rt'r(D)	108,764	64.6	.75	93.3	.75
West(R)	55,201	35.4	.75	6.7	.75

Race/ Total Party/Votes	WHITES Support	Adj R^{2*}	BLACKS Support	Adj R^2
1984 General Election				
District 3				
Poole (D) 63,315	34.5	.87	97.4	.87
M'rst'n(R) 92,345	65.6	.87	2.6	.87
District 6				
Brown (D) 55,367	28.9	.89	91.5	.89
T'way (R)103,251	71.1	.89	8.5	.89
1986 Primary Election				
District 4				
Chapin 23,456	73.6	-.01	73.5	-.01
Warner 8,394	26.4	-.01	26.5	-.01
1986 General Election				
District 2				
Cmpbll(D) 46,440	30.3	.84	93.9	.84
D'rm'n(R) 83,155	69.7	.84	6.1	.84
District 4				
Chapin(D) 67,531	47.4	.86	95.8	.86
Borgon(R) 63,986	52.6	.86	4.2	.86
1988 Primary Election				
District 3				
Herring 17,163	62.9	.03	67.6	.03
Misicka 9,819	37.1	.03	32.4	.03
1988 General Election				
District 1				
Carter(D) 83,503	49.9	.78	93.5	.78
Moore(R) 74,438	50.1	.78	6.5	.78

Race/ Total Party/Votes	WHITES Support	WHITES Adj R^{2*}	BLACKS Support	BLACKS Adj R^2
1988 General Election				
District 3				
H'rr'ng(D) 81,223	47.1	.87	95.1	.87
M'rst'n(R) 81,448	52.9	.87	4.9	.87
District 5				
Hardee(D) 51,435	29.3	.90	96.7	.90
D'ngon(R) 95,202	70.7	.90	3.3	.90
1990 Primary Election				
District 6				
Butler(B) 4,887	45.7	.59	79.3	.58
Hoard (B) 1,341	26.9	.53	12.9	.51
Mills (B) 1,069	27.4	.35	7.8	.35
1990 General Election				
B'tl'r(D) 11,630	44.3	.96	99.2	.96
Rod'z(R) 5,430	55.7	.96	.8	.96

REGRESSION ESTIMATES OF RACIAL VOTING IN COUNTY SCHOOL BOARD AND JUDICIAL RACES CONTESTED BY BLACK AND WHITE CANDIDATES AND IN RELATED CHARTER REFERENDA IN ORANGE COUNTY, FLORIDA 1980-1990

El't'n/ Total		WHITES		BLACKS	
Party/Votes Race		Support	Adj R^{2*}	Support	Adj R^2
1980 Republican Primary					
School Bd. Dist. 5					
Adams(B)	13,955	56.4	.20	83.6	.20
Dav'es(W)	11,262	35.4	.20	16.4	.20
1980 Democratic Primary					
School Bd. Dist. 6					
M't'll (B)	14,083	34.6	.75	85.8	.75
Berry(W)	10,810	39.6	.59	6.3	.59
Wym'n(W)	7,877	25.8	.20	7.9	.20
1980 Democratic Run-Off					
School Bd. Dist. 6					
M't'll(B)	17,650	44.0	.78	90.2	.78
Berry(W)	16,291	56.0	.78	9.8	.78
1980 General Election					
School Bd. Dist. 5					
Adams(B)	68,746	59.2	.01	54.9	.01
K"sky (W)	45,907	40.8	.01	45.1	.01
School Bd. Dist. 6					
M't'll(B)	46,106	33.0*	.84	98.5*	.84
Barn's(W)	70,075	66.1*	.84	1.5*	.84

***These %'s are correct--reversed in publt'n.**

El't'n/ Party/Votes Race		WHITES Support	Adj R^{2*}	BLACKS Support	Adj R^2
1982 Democratic Primary					
School Bd. Dist. 1					
Baker (B)	10,664	29.7	.79	77.6	.79
Hrd'z (H)*	7,321	40.3	.47	13.0	.47
Stone (W)	9,866	30.0	.36	9.4	.36
*Note that Hernandez here is listed racially as an Hispanic. Rodriguez, supra, is listed as white below in a commission race, though he is Hispanic.					
1982 Democratic Run-Off					
School Bd. Dist. 1					
Stone (W)	9,183	60.7	.70	11.4	.70
Baker (B)	9,135	39.3	.70	88.6	.70
1984 General Election					
School Bd. Dist. 4					
White (B)	57,163	31.0	.89	97.9	.89
P'rs'ns(W)	95,395	69.0	.89	2.1	.89
School Bd. Dist. 6					
M't'll (B)	55,000	28.5	.91	99.3	.91
Barn's(W)	98,711	71.5	.91	0.7	.91
School Bd. Dist. 5					
Adams (B)		UNOPPOSED			
1986 Democratic Primary					
School Bd. Dist. 1					
Baker (B)	15,699*	43.1	.65	80.8	.65
Stone (W)	16,062*	56.9	.65	19.2	.65
***Stone won. Pub. vote totals were reversed.**					

El't'n/ Party/Votes Race	Total	WHITES Support	Adj R^{2*}	BLACKS Support	Adj R^2
1986 Nonpartisan Primary					
County Court Judge					
Br'ns'n(B)	32,127	49.2	.49	81.3	.49
Kelley(W)	28,597	50.8	.49	18.7	.49
1986 General Election					
School Bd. Dist. 1					
Baker(B)	52,388	35.3	.85	98.7	.85
G'rd'r(W)	75,935	64.7	.85	1.3	.85
1988 Nonpartisan Primary					
Circuit Judge, Group 3					
Perry (B)	34,472	51.5	.54	74.5	.51
Byrd (W)	28,990	48.5	.54	25.5	.51
1988 Charter Issues					
5 Single Mem. Dist					
Yes	104,293	60.5	.35	72.3	.35
No	63,126	39.5	.35	27.7	.35
6-1 System					
Yes	93,078	55.2	.24	65.5	.24
No	72,753	44.8	.24	34.5	.24
1990 Democratic Primary					
County Comm. Dist. 6					
Butler(B)	4,877	45.7	.59	79.3	.58
Hoard (B)	1,341	26.9	.53	12.9	.51
Mills (B)	1,069	27.4	.35	7.8	.35

El't'n/ Party/Votes Race	Total	WHITES Support	Adj R^{2*}	BLACKS Support	Adj R^2
1990 Nonpartisan Primary					
County Comm. Dist. 6					
Golden(B)	27,287	36.5	.80	79.8	.80
Hart (W)	22,797	36.6	.53	16.8	.51
H'ff'n(W)	16,590	27.0	.35	7.8	.35
1990 General Election					
County Judge					
Golden(B)	63,240	49.2	.76	79.1	.78
Hart (W)	16,590	27.0	.56	20.9	.78
County Comm. Dist. 6					
Butler(B)	11,630	44.3	.96	99.2	.96
Rod'z (W)(sic)	5,430	55.7	.96	0.8	.96

*R^2 is a coefficient of determination. Higher values reflect a better fit of the data to the regression analysis. The upper limit is 1.0.

PETITIONERS' NOTE: Note that there is no total vote in any of the elections according to race, i.e. in no race is it indicated how many blacks voted and how many whites. Note also the aforementioned errors in the ongoing notes. Only the "R^2" note is that of the Court.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO FLORIDA
CASE NO. 90-547-CIV-ORL-19

CORNELL WILLIAMS, ET AL.,
Plaintiffs,

v.

ORANGE COUNTY, FLORIDA, BOARD OF COUNTY COMMISSIONERS, et al.,
Defendants.

_____/

ORDER

Upon due deliberatioon and consideration of Plaintiffs'

MOTION: To Set Aside an Order of a Magistrate Judge Denying Access to Court in This Action Specifically Sought for a Discovery Conference.

FILED: October 15, 1991 (Doc. No. 73).

It is hereby ORDERED that the Motion is DENIED.

DONE AND ORDERED at Orlando, Florida, this 28th day of January, 1992.

/s/ James L. Watson
JAMES L. WATSON
UNITED STATE DISTRICT JUDGE
(Sitting by Designation)

Copies to: Counsel of Record
FILED: 92 JAN 28....

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO FLORIDA
CASE NO. 90-547-CIV-ORL-19

CORNELL WILLIAMS, et al.,
Plaintiffs,
v.
ORANGE COUNTY, FLORIDA, BOARD OF COUNTY COMMISSIONERS, et al.,
Defendants.
_____/

ORDER

This case was considered by the Court upon the following matters:

1. Motion of Defendant Orange County for Summary Judgment, filed November 15, 1991 (Doc. No. 79).

The parties are hereby notified that the Court will take the Motion for Summary Judgment under advisement on December 20, 1991. Until that date, the parties may file affidavits or other documents within the purview of Federal Rule of Civil Procedure 56 in support of or in opposition to the motion. Failure to oppose the Motion for Summary Judgment may result in judgment for movants without further proceedings. See Milburn v. United States, 734 F.2d 762 (11th Cir. 1984); Griffith v. Wainwright, 772 F.2d 822 (11th Cir. 1985).

3. (sic--no 2.) Motion by Defendants for Continuance of Pretrial Conference and Trial (Doc. No. 84, filed December 2, 1991). Upon consideration, Defendants' Motion for Continuance of Pretrial Conference and Trial (Doc. No. 84) is DENIED with leave to reassert the Motion for Continuance of Trial at the Pretrial Conference.

DONE AND ORDERED at Orlando, Florida, this 4th day of December, 1991.

/s/Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to: All counsel of Record.
FILED 5 DEC 91

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

NOTICE OF PRETRIAL CONFERENCE

Senior Judge James L. Watson will be sitting in Orlando as a visiting judge beginning January 2, 1992. He will be trying civil cases assigned to Judge Patricia C. Fawsett's January 1992 trial calendar. On December 9 and 10, 1991, Judge Watson will hold scheduling/pretrial conferences in Courtroom 3 in the United States Courthouse, 80 North Hughey Avenue, Orlando, Florida as set forth below. Please call Sandy Zimmerman in the Clerk's Office in Orlando at (407) 648-6899 if you have any questions concerning these scheduling/pretrial conferences.

Monday, December 9, 1991:

9:30 a.m. 90-707-Civ-Orl-19
CLIFFORD C. WOOD, et al., v. Robert E. Weisberg
GRUMMAN AEROSPACE CORP. Frank...Kruppenbacher
10:15 a.m. 90-589-Civ-orl-19
ARTHUR C. CONKLING v. Julius L. Williams
GRUMMAN AEROSPACE CORP. Frank...Kruppenbacher
11 a.m. 90-698-Civ-Orl-19
ZOLTAN A. ANTHONY, et al. v. John G. Pierce
EASTMONT GROUP, INC., et al. Jerome Tremont....
11:45 a.m. 86-400-Civ-Orl-19
HARTMUT BACHMANN v. Sherri K. DeWitt
ERNST D. KLEIN, et al., Terrence W. Ackert

1:30 p.m. 90-384-Civ-Orl-19	
WESTFIELD COMPANIES v.	Janet L. Brown
ROYAL ORIENTAL RUGS, INC.	Paul M. Thompson....
2:15 p.m. 87-327-Civ-Orl-19	
DEBI WILLIAMS v.	C. Chobee Ebbets
A.G. CONTINENTAL...	John A. Reed, Jr.
3:00 p.m. 90-802-Civ-Orl-19	
LEONARD QUICK v.	James R. Valerino
TAMAR VISTA INC., INC., et al.	Walter D. Rogers....
3:45 p.m. 90-470-Civ-Orl-19	
FREDERICK J. AUGUSTIN v.	Ronald L. Harrop
BORDEN, INC.	Bradford Swing
Tuesday, December 10, 1991:	
9:30 a.m. 90-494-Civ-Orl-19	
WORLDWIDE UNDERWRITERS...	James K. Powers
v. MICHAEL TRACY, et al.	Mark W. Clark....
90-587-Civ-Orl-19	
MICHAEL L. TRACY v.	Joseph J. Reiter
WORLDWIDE UNDERWRITERS...	John W. Smith....
10:45 a.m. 90-547-Civ-Orl-19	
CORNELL WILLIAMS et al. v.	Johnie A. McLeod....
THE ORANGE COUNTY...	Arthur B. Applegate....
11:30 a.m. 90-590-Civ-Orl-19	
CONTINENTAL CASUALTY v.	Geoffrey D. Ringer
KACO CONTRACTING...	William E. Lawton....
1 p.m. 90-769-Civ-Orl-19	
MARY E. TEAGUE v.	Pro se
THE FLORIDA DEPARTMENT....	Linda C. Quillen....

1:45 p.m. 90-878-Civ-Orl-19	
RHONDA FLAGLER, et al., v.	Treena Ann Kaye
THE HOUSING AUTHORITY...	Stanley E. Halbert
2:30 p.m. 91-24-Civ-Orl-19	
PAUL ERIC DYKES v.	Pro Se
GENIUS WORKSHOP, INC., et al.	Pro Se

November 15, 1991

DAVID L. EDWARDS, Clerk
/s/Sandy Zimmerman
Deputy Clerk

To: All counsel of record and pro se litigants

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CORNELL WILLIAMS, et al.,
Plaintiffs,
v. Case No. 90-547-Civ-Orl-19

ORANGE COUNTY, FLORIDA BOARD
OF COUNTY COMMISSIONERS, et al.,
Defendants.
_____/

ORDER

This cause came consideration without oral argument on the following Motion(sic) filed herein:

MOTION FOR SEPARATE TRIALS AND FOR PROTECTIVE ORDER

FILED SEPTEMBER 6, 1991 by Defendants (*63)

Thereon it is ORDERED that the Motion for Protective Order is denied. The Motion for Separate Trials is reserved to the District Judge presiding.

MOTION TO COMPEL DISCOVERY AND FOR AWARD OF ATTORNEYS' FEES AND COSTS

FILED SEPTEMBER 6, 1991 by Defendants (*64)

Thereon it is ORDERED that the Motion is denied.

MOTION PLAINTIFFS' MOTION FOR A DISCOVERY CONFERENCE
FILED September 16, 1991 (*65)

Thereon it is ORDERED that the Motion is denied /s/ D.P. Dietrich
D. P. Dietrich
United States Magistrate Judge

Copies furnished to:
(Counsel of record)
COPIES MAILED ON 3 October 1991
by _____/initialed
Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CORNELL WILLIAMS, et al.,
Plaintiffs,
v. Case No. 90-547-Civ-Orl-19

ORANGE COUNTY, FLORIDA BOARD
OF COUNTY COMMISSIONERS, et al.,
Defendants.
_____/

ORDER

This cause came consideration without oral argument on the following Motion(sic) filed herein:

MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND FOR AWARD OF COSTS AND ATTORNEYS' FEES

FILED June 21, 1991 by Defendants (#55)

Thereon the Motion is granted. The Interrogatory answers are wholly inadequate. Full and complete written answers to the Interrogatories shall be provided within twenty (20) days. No fees or costs.

MOTION JOINT MOTION TO EXTEND DISCOVERY SCHEDULE AND DEADLINE FOR FILING DISPOSITIVE MOTIONS

FILED June 28, 1991 (#57)

Thereon it is ORDERED that the Motion is granted in part. Discovery shall close November 1, 1991. All motions shall be filed by November 15, 1991, and the pre-trial stipulation shall be filed by December 1, 1991.

DONE AND ORDERED at Orlando, Florida this 2nd day of July, 1991.

/s/ D. P. Dietrich
D. P. Dietrich
United States Magistrate Judge

Copies furnished to:
(Counsel of record)
COPIES MAILED ON 2 July 1991
by _____/initialed
Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CORNELL WILLIAMS, et al.,
Plaintiffs,
v. Case No. 90-547-Civ-Orl-19

ORANGE COUNTY, FLORIDA BOARD
OF COUNTY COMMISSIONERS, etc. et al.,
Defendants.
_____/

ORDER CERTIFYING CLASS

This case was considered at hearing attended by counsel for all parties on December 10, 1990 to consider the Motion of Plaintiffs for Class Certification (Doc. No. 46, filed October 19, 1990).

No opposition to Plaintiffs' Motion for Certification being presented, the Court certifies the Plaintiff class defined as all black citizens of Orange County, Florida who are now, who will be, or who have been eligible, to vote since 1980.

DONE AND ORDERED at Orlando, Florida this 7th (sic) day of December, 1990.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record
FILED 90 DEC 11....

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CORNELL WILLIAMS, et al.,
Plaintiffs,
v. Case No. 90-547-Civ-Orl-19

ORANGE COUNTY, FLORIDA BOARD
OF COUNTY COMMISSIONERS, etc., et al.,
Defendants.
_____/

ORDER

This case was considered by the Court on the Motion of Plaintiffs' for Class Certification (Doc. No. 46, filed October 19, 1990).

The Court will hold a hearing on such Motion on December 10, 1990, at 11:45 a.m. in Courtroom II, Sixth Floor, Federal Building, 80 North Hughey Avenue, Orlando, Florida, this 28th day of November, 1990. /s/Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record,
Lou Pirone, Courtroom Deputy
FILED: 90 NOV 28

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CORNELL WILLIAMS, et al.,
Plaintiffs,
v. Case No. 90-547-Civ-Orl-19

ORANGE COUNTY; FLORIDA BOARD
OF COUNTY COMMISSIONERS, and others.
Defendants.
_____/

ORDER

This case is before the Court after hearing on August 31, 1990, on the Motion of Plaintiffs for Preliminary Injunction (Doc. No. 2, filed July 23, 1990). Plaintiffs have submitted the following materials in support of their Motion: Memorandum in Support of Motion (Doc. No. 4, filed July 23, 1990); Second Memorandum in Support and Response (Doc. No. 37, filed August 27, 1990); Case Cites (received August 27, 1990). Defendants have submitted a Response to Plaintiffs' Motion (Doc. No. 21, filed August 3, 1990) accompanied by supporting Affidavits (Doc. Nos. 23 & 24, filed August 3, 1990).

PRELIMINARY INJUNCTION

Plaintiffs, Cornell Williams, James Jackson, Wardell Sims, James Q. Mitchell, the Orange County Political Coalition, and the Committee of Organized Groups seek a preliminary injunction to stay the impending primary election on September 4, 1990, of County Commissioners in Orange County, Florida. Plaintiffs allege that the six single-member district commissioners and the single County Chairman elected at-large dilutes the voting strength of black citizens in Orange County in violation of the 14th and 15th Amendments to the United States Constitution and the Voting Rights Act, 42 U.S.C.A. § 1973 (1982).

Defendants, the Orange County, Florida, Board of County Commissioners, Commission Chair Hal Marston, Former Commission Chair Tom Dorman, Commissioners Linda Chapin, Vera Carter, and Bill Donegan, and Supervisor of Elections Betty Carter contend that Plaintiffs have failed to meet the prerequisites entitling them to preliminary injunctive relief and further allege that Plaintiffs are barred by the doctrine of laches.

In order for a preliminary injunction to be issued, the Court must find that the moving party has satisfied four prerequisites. First, there must

a substantial likelihood of success on the merits. Second, there must be a showing that the movant will suffer irreparable injury unless the injunction is issued. Third, the movant must show that the injury to the movant outweighs the damage the proposed injunction may cause the opposing party. Fourth, movant must demonstrate that if issued the injunction will not be adverse to the public interest. Compact Van Equipment Co. v. Leggett & Platt, Inc., 566 F.2d 952, 954 (5th Cir. 1978).

SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS

The Plaintiffs have failed to demonstrate a substantial likelihood of ultimately prevailing on the merits. The Plaintiffs must meet a three part test as a threshold to maintaining a claim under section 2 of the Voting Rights Act. Solomon v. Liberty County, Florida, 4 FLW FED C482, 485 (11th Cir. May 11, 1990); see also Thornburg v. Gingles, 478 U.S. 30 (1986). Plaintiffs' probability for success on the merits should be evaluated in light of these three factors.

First, Plaintiffs must demonstrate the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district. Solomon, 4 FLW Fed at 485. If the minority group is too small or

dispersed under any reasonable plan, then the plaintiffs cannot prevail. Id.

Second, Plaintiffs must be able to show that the minority group is politically cohesive. "An at-large system cannot be responsible for submerging a minority group's political interests if that group does not have common interests evidenced by a pattern of block voting." Gingles at 51.

Third, Plaintiffs must be able to show that the white majority votes sufficiently as a block to enable it to usually defeat the minority's preferred candidate. Solomon at 485; Gingles at 56.

Plaintiffs have failed to demonstrate that a politically and geographically cohesive minority district could reasonably be created. Plaintiffs' own expert by affidavit has stated that it would take more than seven districts for a compact and contiguous black majority district to be created (Doc. No. 38, E. 11, filed August 27, 1990). No information was given regarding the number of districts which would be necessary to provide a single compact and contiguous black majority district. Therefore, the Court has no basis for making a determination as to Plaintiffs' contentions concerning the existence of a

reasonable plan.[1]

Additionally, Plaintiffs have failed to provide sufficient evidence to meet the second and third of the threshold requirements. Plaintiffs have provided no clear evidence of an established pattern of block voting among the minority group. Finally, there is no convincing evidence that the white voters consistently vote as a block to defeat minority candidates.

PUBLIC INTEREST

In addition, Plaintiffs have failed to persuade the Court that issuance of the injunction would not be adverse to the public interest. In support of their motion Plaintiffs rely on Dillard v.

1--Plaintiffs' expert witness, Professor Mark Stern, notes "[a] seven district commissioner plan could produce a minority (black and hispanic) district in which the voting preference of blacks and hispanics could produce a majority vote." (Doc. No. 38, E.10, filed August 27, 1990). Professor Stern states that the black vote is predominantly democratic. No information has been presented on the voting patterns of hispanics. There was no information on whether blacks and hispanics would vote as a politically cohesive block.

Crenshaw County, Ala., 640 F. Supp. 1347, 1362 (M.D. Ala. 1986). Even though the four prerequisites for a preliminary injunction were met, the Court in Dillard refused to order a stay of the impending primary elections which were less than three months away because it would be unfair and unreasonable to require implementation of a new apportionment scheme in the time remaining. Id. at 1362. The Dillard Court found that an injunction of the impending elections "would effectively deny the entire electorate the right to vote and thus seem to offend the basic principles of representative government." Id. at 1363.

This new system of government was approved by the Orange County voters on November 8th, 1988. (Doc. No. 1, Complaint of Plaintiffs at ¶ 3, filed July 23, 1990; Doc. No. 23, Affidavit of Betty Carter, Supervisor of Elections for Orange County, filed August 3, 1990). The elections which the Plaintiffs seek to enjoin are set for September 4, 1990, four days from the date of the hearing and forty-three days from the filing of the Complaint. Where an election is imminent and the election process engaged, a Court may be justified in withholding injunctive relief in an apportionment case. Reynolds v. Sims, 377 U.S. 533, 585 (1964).

> In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexity of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.
> Reynolds at 585.

Staying the impending Orange County elections at this late date in the process would be contrary to the public interest and the benefits to the Plaintiffs from injunctive relief would be outweighed by the harm to the Defendants and the public. As plaintiffs have failed to establish the necessary prerequisities to warrant a preliminary injunction[2], the Motion for Preliminary Injunction is DENIED.

2--Plaintiffs assert that the perpetuation of the dilution of voting strength establishes irreparable harm. It is unnecessary for the Court to address the prerequisite of irreparable injury since the

DONE AND ORDERED at Orlando, Florida, this 31st day of August, 1990.

/s/ Patricia C. Fawsett,
PATRICIA C. FAWSETT,
UNITED STATES DISTRICT JUDGE

Copies to: All Counsel of Record.

2 (cont.)--Plaintiffs have failed to show likelihood of success on the merits and that injunctive relief is in the public interest. The Court notes there is a conflict as to whether irreparable injury is presumed in voting rights cases. Two District Courts within the Eleventh Circuit have held that irreparable harm is presumed in voting rights cases. Dillard at 1363; Harris v. Graddick, 593 F. Supp. 128, 135 (M.D. Ala. 1984). The Eleventh Circuit has not yet ruled on this issue. The Fifth Circuit in Chisom v. Roemer, 853 F.2d 1186, 1189 (5th Cir. 1988), has declined to adopt this presumption of irreparable harm.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CORNELL WILLIAMS, et al.,
Plaintiffs,

v. Case No. 90-547-Civ-Orl-19

ORANGE COUNTY, FLORIDA BOARD
OF COUNTY COMMISSIONERS, and others.
Defendants.

_____/

ORDER

This case is .before the Court on the following matters:

1. The Motion and Memorandum of Plaintiffs for Reassignment of Case (Doc. Nos. 14 and 15, filed July 27, 1990). This Motion is DENIED.

2. The Motion and Memorandum of Plaintiffs for Sanctions (Doc. Nos. 25 and 26, filed Aug. 6, 1990). This Motion is DENIED.

3. The Motion and Memorandum of Plaintiffs for Reconsideration of Order Denying Recusal (Doc. Nos. 27 and 28, filed Aug. 6, 1990). This Motion is DENIED.

4. The Motion and Memorandum of Plaintiffs for Preliminary Injunction (Doc. Nos. 2 and 4, filed

July 23, 1990). Defendants have filed a Response and Memorandum in Opposition to the Motion for Preliminary Injunction (Doc. Nos. 20 and 21, filed Aug. 3). This Motion shall be taken under advisement at the hearing scheduled below.

5. The Motion of Plaintiffs for Hearing on the Motion for Preliminary Injunction (Doc. No. 3, filed July 23, 1990). This motion is GRANTED.

A hearing on Plaintiffs' Motion for Preliminary Injunction is scheduled for Friday, August 31, 1990, at 11:45 a.m. before the undersigned Judge in Courtroom 2, Sixth Floor of the Federal Building, 80 North Hughey Avenue, Orlando, Florida. One hour has been set aside for this hearing. Prior to this date, the parties may file additional materials, including memoranda and affidavits, in support of or in opposition to the Motion for Preliminary Injunction. See Rule 4.06, Local Rules, United States District Court, Middle District of Florida.

DONE AND ORDERED at Orlando, Florida, this 15th day of August, 1990.

/s/Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to: All Counsel of Record.
FILED 90 AUG 15....

UNITED STATES DISTRICT COURT
Middle District of Florida
Office of the Clerk
80 North Hughey Avenue
Orlando, Florida 32801

July 30, 1990

NOTICE OF JUDICIAL REASSIGNMENT

Former Case Number: 90-547-Civ-Orl-18
Redesignated Case Number; 90-547-Civ-Orl-19
Case Style: Cornell Williams, etc., et al., v. The Orange County, Florida, Board of County Commissioners, et al

Pursuant to Court order, the above-styled action has been reassigned to the Honorable Patricia C. Fawsett for all further proceedings. As a result of the reassignment, the District Court case number has also been changed to 90-547-Civ-Orl-19.

It is imperative that all future pleadings and/or papers offered for filing reference this designated case number, otherwise papers may be misfiled or delayed in getting to the assigned judicial officer.

Sincerely,
DAVID L. EDWARDS, CLERK
By: /s/Jan McClung
Deputy Clerk

cc: Counsel of Record
FILED: 90 JUL 30....

JUDICIAL REASSIGNMENT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CORNELL WILLIAMS, et al.,
Plaintiffs,
v. Case No. 90-547-Civ-Orl-19

ORANGE COUNTY, FLORIDA BOARD
OF COUNTY COMMISSIONERS,
Defendants.
_____/

ORDER

This case was considered by the Court on Plaintiff's Motion for Recusal (Doc. No. 5, filed July 23, 1990). Upon consideration, the Plaintiff's Motion for Recusal as it pertains to the undersigned Judge (Doc. No. 5) is DENIED.

DONE AND ORDERED at Orlando, Florida, this 27th day of July 1990.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record
FILED 90 JUL 27

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CORNELL WILLIAMS, et al.,
Plaintiffs,
v.
THE ORANGE COUNTY, FL BOARD OF COMMISSIONERS et al.
Defendants.
_____/

Case No /s/90-547-CIV-ORL-18

STAMPED on the face of the Motion
GRANTED and SO ORDERED this
23 day of July 1990
/s/G. Kendall Sharp
G. KENDALL SHARP
United States District Judge

PLAINTIFF'S MOTION FOR RECUSAL

COMES NOW Plaintiff COMMITTEE OF ORGANIZED GROU(PS, ("COG"), on the basis of the affidavit of its correspondence secretary Plaintiff James Jackson and moves for recusal of judges resident in Orlando, Florida.

This motion is made pursuant to 28 U.S.C. §§144 and 455a. The affidavit is timely and should suffice to prevent these judges from

proceeding further. Another judge should be assigned to hear the proceeding.

Both the Hon. G. Kendall Sharp, and the Hon. Patricia Fawsett did recuse themselves when requested to do so by COG in its proceeding against the City of Orlando, 88-962-Civ-Orl-18 (10). Judge Sharp recused himself, because of what he stated was possible bias against the COG counsel who appears in this matter as well. Judge Fawsett did so for the sake of the appearance of justice. Each has recused himself or herself in two other matters in which this counsel has filed civil actions.

All three proceedings continue before a judge other than Judges Sharp or Fawsett. In COG v. City of Orlando, supra, black Plaintiffs claimed they were being resegregated by various public projects being created by the municipality. Judge W. T. Hodges has denied a motion to dismiss claims in that action made pursuant to 42 U.S.C. §§1981, 1982, and 1983.

FILED 90 JULY 24....

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CORNELL WILLIAMS, et al.,
Plaintiffs,
vs. CASE NO. 90-547-CIV-ORL-19

THE ORANGE COUNTY, FLORIDA
BOARD OF COUNTY COMMISSIONERS,
et al.,
Defendants.
_____/

PRE-TRIAL STIPULATION

COME NOW the Plaintiffs, Cornell Williams, James Jackson, Wardell Sims, and James Q. Mitchell, and all black citizens of Orange County, Florida who are now, who will be or who have been eligible to vote since 1980, and the Orange County Political Coalition; and Defendants, the Orange County Board of County Commissioners, and the Supervisor of Elections, by and through their undersigned attorneys, and pursuant to Local Rule 3.06, file and serve their joint Pre-Trial Stipulation as follows:....

9. Statement of Issues of Fact Which Remain to Be Litigated:

a. Whether blacks are sufficiently numerous and geographically compact to constitute a majority in a single-member district in Orange County, Florida.

b. Whether legally significant racial bloc voting has occurred in Orange County elections between 1980 and 1990.

c. Whether the 6-1 plan was adopted or is being maintained with the intent of discriminating against black electors or otherwise diluting the voting strength of black electors in Orange County.

d. Whether Orange County has acted with intent to deny blacks the rights guaranteed to them under the Fifteenth Amendment.

e. All mixed law/fact issues listed in 10., infra.....

12. List Of All Motions Or Other Matters Requiring Court Action At This Time.

a. Defendants' Motion for Summary Judgment.

b. Plaintiffs' Motion to Disqualify Tom Wilkes, Orange County Attorney.

c. Defendants' Motion for a Continuance.

d. Defendants' Motion in Limine.

e. Plaintiffs' Motion to Set Aside Magistrate's Denial of Discovery Conference.

Respectfully submitted,

Johnie A. McLeod, Esq.
McLeod, McLeod & McLeod
P.O. Drawer 950
Orlando, Florida 32792(sic)
(Apopka, Florida 32703)

Charles G. Burr, esq.
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201 E. Kennedy Blvd.
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Gabe Kaimowitz, esq.
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A. Bryant Applegate
Assistant County
Attorney
P.O. Box 1393
Orlando, Florida 32802

Attorneys for Plaintiffs
/s/Gabe Kaimowitz
Fla. Bar No. 0633836

Attorneys for Defendants
/s/ A. Bryant Applegate
Fla. Bar No., 346926

DATED this 3rd day of December 1991.

DOCKET entry--"12/5/91 *86 PRETRIAL STATEMENT (bsl) [Entry date 12/05/91]"

SUPREME COURT OF THE UNITED STATES

No. A-703
Orange County Political Coalition, et al.,

Petitioners,

v.

Orange County, Florida, et al.,

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including April 27, 1993.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme
Court of the United States

Dated: this 18th
day of March, 1993.

Supreme Court, U.S.
FILED
MAY 24 1993
OFFICE OF THE CLERK

No. 92-1723

In The

Supreme Court of the United States

October Term, 1992

CORNELL WILLIAMS, et al.,

Petitioners,

vs.

ORANGE COUNTY, FLORIDA BOARD OF COUNTY COMMISSIONERS, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the district court properly enter summary judgment in favor of the respondents, when the petitioners failed to proffer any probative evidence demonstrating the existence of a genuine issue of material fact concerning either vote dilution or intentional discrimination against African-American voters?

2. Did the district court deprive the petitioners of an opportunity to proffer evidence in support of their claims?

3. Does the Eleventh Circuit's decision, which affirmed the district court's entry of summary judgment in favor of the respondents, conflict with the decisions of other circuits?

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Supreme Court Rule 15 6

CITATIONS TO OPINIONS BELOW

The district court's opinion, which entered summary judgment in favor of the respondents, is reported at 783 F. Supp. 1348 (M.D.Fla. 1992).

The opinion of the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's opinion, is reported at 979 F.2d 1504 (11th Cir. 1992).

STATEMENT OF THE CASE

A. Statement Of Facts And Disposition By The Courts Below

This lawsuit was filed as a class action in July 1990 by the petitioners, a group of African-American voters in Orange County, Florida [R.1]. The lawsuit alleges that the county's system for electing members of the Board of County Commissioners ("BOCC") violates Section 2 of the Voting Rights Act of 1965 ("Section 2") by diluting the voting strength of African-Americans, and violates the Fourteenth and Fifteenth Amendments to the Constitution of the United States because it was created and is operated with discriminatory intent.

The challenged election system provides for six members of the BOCC to be elected from single-member districts and one member, who serves as chairperson, to be elected at-large ("the 6-1 system"). The 6-1 system was implemented in November 1988. It replaced a system under which five members of the BOCC all were elected at-large. The feature of the 6-1 system that is the focus of

the petitioners' challenge is the at-large election of the BOCC's chairperson.

Throughout the mid-1980s, there was extensive public debate about the best way to reform the old, all-at-large system. In April 1986, the BOCC established a Citizens Charter Government Study Committee ("CCGSC") to investigate the adoption of a home rule charter[1] for Orange County and various other issues, including alternative ways of electing BOCC members. The CCGSC's final report included a recommendation for the adoption of a home rule charter, and a recommendation that the November 1988 general election include a referendum on whether BOCC members should be elected from single-member districts. [R.79]. The BOCC accepted both recommendations. Thus Orange County began operating under a home rule charter on January 1, 1987.

In August 1987, the BOCC created a 15-member Charter Review Commission ("CRC") to study ways to improve the newly-adopted home rule charter. Two of the 15 members were African-Americans. There was an ongoing debate among the CRC members about the form of the proposition or propositions that would be placed before the county's voters in the November 1988 referendum on the issue of single-member district elections. In its final report, the CRC voted in favor of placing two propositions on the ballot, one of which called for the adoption of a system with five single-member districts, and the other which called for adoption of the 6-1 system.

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[1] Article VIII, Section 1(c) of the Florida Constitution and *Fla. Stat.* Chapter 125, Parts II and IV (1974) provide for the adoption of home rule charters by Florida's counties.

The vote of the CRC in favor of placing these two propositions on the ballot was 13 in favor and two opposed. Both of the African-American members voted in favor. [R.79; R.100-16, 18].

In the November 1988 referendum, both propositions received a majority of "yes" votes. [R.79; R.100-4]. A substantial majority of Orange County's African-American voters cast their votes in favor of the 6-1 system. The CRC's legal counsel opined that the "yes" vote in favor of the 6-1 system took precedence over the "yes" vote in favor of the system with five single-member districts. [R.79; R.100-4]. The result was Orange County's adoption of the 6-1 system for electing BOCC members.[2]

In January 1989, the BOCC created the Orange County Redistricting Advisory Committee ("RAC"), which was charged with the responsibility of dividing the county into six county commission districts. The RAC drew the district lines in a manner designed to maximize the opportunity of African-American voters to elect a candidate of their choice in at least one of the newly-created districts. [R.79, Appendix Vol. I, Exhibits A and G].

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[2] A state court lawsuit was filed challenging the procedure used by Orange County to implement the 6-1 system. The trial court ruled in favor of the county, finding that "the [referendum] election was free and fair . . . [and] the two propositions, as presented, were not inconsistent and the passage of both propositions amounted to a choice by the electorate to enact [the 6-1 system]." *Orange County Political Coalition, Inc. v. Orange County Election Board*, Circuit No. CI88-8114. The plaintiffs appealed. On April 3, 1990, the Fifth District Court of Appeal of Florida issued a *per curiam* affirmance of the trial court's ruling.

The first elections for BOCC members under the 6-1 system were scheduled for the fall of 1990. [R.2, 3, 4]. When the petitioners filed their lawsuit in July 1990, they sought to enjoin the elections. After hearing arguments on the petitioners' motion [R.35], the district court declined to issue an injunction. [R.45].

The 1990 elections were held as scheduled. They resulted in the election of an African-American – the BOCC's first – from one of the single-member districts, and the at-large election of a white chairperson with substantial support from African-American voters. [R.79, Appendix Vol. II].

Meanwhile, the litigation continued. In September 1991, the petitioners filed a motion pursuant to Fed.R.Civ.P. 26(f) seeking a discovery conference. [R.65]. The respondents opposed the motion on the ground that the petitioners were merely seeking to re-argue discovery issues that already had been resolved against them. [R.67]. On October 3, 1991, the United States Magistrate entered an order denying the petitioners' request for a conference. [R.68]. The petitioners appealed to the district court [R.73], which upheld the Magistrate's ruling. [R.99].

On November 15, 1991, the respondents filed their summary judgment motion. [R.79, 80]. The motion asserted that the petitioners could not prevail on their vote dilution claim under Section 2 because they could not proffer any probative evidence of racial bloc voting, as required by the Supreme Court in *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986). The respondents also asserted that the petitioners could not proffer any probative evidence

that the 6-1 system was either created or maintained with discriminatory intent in violation of the Fourteenth and Fifteenth Amendments.

Pursuant to the district court's local rules, the petitioners were required to respond to the respondents' summary judgment motion within 10 days. However, on December 5, 1991, the district court entered an order giving the petitioners an additional 25 days. [R.85]. Thus the petitioners had a total of 35 days to respond.

In response to the summary judgment motion, the petitioners filed a motion pursuant to Fed.R.Civ.P. 56(f)[3] seeking a delay in order to conduct additional discovery for use in opposing summary judgment. [R.87]. The petitioners did not respond on the merits.

On January 31, 1992, the district court[4] entered an order denying the petitioners' Rule 56(f) motion and entering summary judgment in favor of the respondents. [R.100]. Judgment was entered on February 3, 1992. [R.101]. The petitioners filed a motion to alter or amend the judgment, which was denied. [R.107].

The petitioners appealed to the United States Court of Appeals for the Eleventh Circuit. On December 28,

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[3] The petitioners' motion also sought unspecified relief under Fed.R.Civ.P. 56(e). The petitioners have acknowledged that the reference to Rule 56(e) was a mistake. Petition at 39-40.

[4] On November 15, 1991, the presiding district judge assigned the case to a visiting judge, James L. Watson, for trial. [R.82].

1992, the Eleventh Circuit issued a *per curiam* affirmance of the district court's ruling.

B. Misstatements Of Fact In The Petition

The Petition for a Writ of Certiorari contains a number of misstatements of fact. Pursuant to the directive of Supreme Court Rule 15, the misstatements are itemized as follows:

1. The petitioners allege that "the [home rule] charter was intended to avoid a state-imposed county commission election system which would assure a meaningful voting opportunity for blacks." Petition at 19.

There is no evidence in the record supporting this allegation. In fact, the district court found that "[the respondents] have convincingly demonstrated that the 6-1 system was *not* created and is *not* operated for a discriminatory purpose. [Petitioners] have failed to respond with *any* fact indicating the existence of a genuine issue with respect to intentional discrimination." 783 F. Supp. at 1354 (emphasis supplied). On appeal, the Eleventh Circuit adopted this finding. 979 F.2d 1504.

2. The petitioners allege that "[w]hites who long controlled politics in Orange County sought a system to preserve their rule." Petition at 19.

There is no evidence in the record supporting this allegation. *See* paragraph 1, above.

3. The petitioners allege that " . . . the white county leadership was united in resistance to a Florida mandate

for county commissioners to be elected from individual districts in which they resided. . . . " Petition at 19.

There is no evidence in the record supporting this allegation. In fact, the record shows that of the 13 white members of the CRC, 11 voted in favor of placing two propositions on the November 1988 referendum ballot which would allow for single-member district voting. [R.79; R.100-16, 18].

4. The petitioners allege that " . . . the all-white Orange County Commission proposed avoiding the state-mandated commission election system alternatives by securing home rule through enactment of a charter." Petition at 21.

There is no evidence in the record supporting this allegation. *See* paragraph 1, above.

5. The petitioners allege that "[i]n Orange County, there is minimal personal contact between the black and white citizenry." Petition at 27-28.

There is no evidence in the record supporting this allegation. *See* paragraph 1, above.

6. The petitioners allege that "[u]npleasant news about racial or economic disparity understandably was not, is not welcomed in Orange County." Petition at 31-32.

There is no evidence in the record supporting this allegation. *See* paragraph 1, above.

7. The petitioners allege repeatedly that they were denied an opportunity to proffer evidence in opposition to the respondents' summary judgment motion. For

example, the petitioners assert that they " . . . found themselves on the street again without a day in court," Petition at 32; that the district court's hearing on the respondents' motion for preliminary injunction was " . . . the last chance counsel were afforded to be heard by any jurist," Petition at 36; that unless this Court reverses the decisions of the courts below, " . . . [the petitioners'] right to be heard in open court about the 6-1 county commission election system [will be] lost forever," Petition at 44; that the district court " . . . expedite[d] the matter away from court without any evidentiary opportunity," Petition at 55; that the petitioners "were never given a chance to present evidence . . . on the motion for summary judgment," Petition at 57; and that "[the] certified class of tens of thousands of black citizens has been given no opportunity to be heard," Petition at 59.

These assertions grossly mischaracterize the district court proceedings. In fact, the petitioners had 17 months within which to complete their discovery prior to the filing of the respondents' summary judgment motion. Once that motion was filed, the petitioners had a total of 35 days within which to proffer evidence creating a genuine issue of material fact concerning their claims. They were unable to proffer any such evidence. Instead, they sought a delay in order to conduct additional discovery. The district court rejected that request, finding that

> [Petitioners] have given no reason why, in more than one year of discovery and one month from the filing of the motion for summary judgment, they could not procure affidavits going to the elements of their case.

On appeal, the Eleventh Circuit adopted this finding. 979 F.2d 1504.

SUMMARY OF THE ARGUMENT

The petitioners seek to involve this Court in a review of one of the most well-settled principles of federal jurisprudence, namely, that a district court properly can enter summary judgment against a party who, after ample discovery, is unable to proffer any evidence in support of its claims. In this case, the petitioners were unable to proffer any such evidence, resulting in the entry of summary judgment against them. On appeal, the Eleventh Circuit affirmed.

Now the petitioners attempt to assert facts that are not in the record, to attack the sufficiency of the respondents' proof in support of their summary judgment motion, and to quibble about the district court's rulings on discovery and evidentiary issues. These are not matters of national importance that require this Court's attention.

The petitioners also argue that the Eleventh Circuit's *per curiam* affirmance of the district court's disposition of this case places the Eleventh Circuit in conflict with a 1990 decision of the Ninth Circuit and a 1987 decision of the Fifth Circuit. The petitioners, however, have misconstrued the decisions of the latter two courts and have ignored a 1992 decision of the Ninth Circuit that is directly contrary to their asserted position. There simply is no conflict between the decisions of those courts and the Eleventh Circuit's decision in this case.

ARGUMENT

A. The District Court Properly Entered Summary Judgment Against The Petitioners On Their Constitutional Claims

The petitioners argue that because this case includes allegations of intentional discrimination, they are entitled to a trial on the merits of those allegations. Petition at 44-47. The petitioners' argument, however, is misplaced. It overlooks the fundamental purpose of Fed.R.Civ.P. 56, which is to test the factual foundation of claims in order to determine whether there is a basis for trial. *Jackson v. Werner*, 394 F. Supp. 805 (W.D.Pa. 1975)("[s]ummary judgment is a method of testing whether there is any real basis for relief"); *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 25 (D.Ore. 1966)(Rule 56 has "the express purpose of forcing the [party opposing the motion] to show his hand and present facts which would justify a trial on that issue").

Citing *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), the petitioners assert that the foregoing principle does not apply to voting rights cases in which allegations of intentional discrimination have been made. The petitioners, however, misconstrue *Garza*. Nothing in *Garza* limits the manner in which summary judgment procedures can be applied to voting rights claims arising under the Fourteenth and Fifteenth Amendments.

Moreover, the facts of *Garza* clearly are distinguishable from the facts of the instant case. In *Garza*, the Ninth Circuit stated:

> The district court found persuasive the evidence showing that the Board had engaged in intentional discrimination in redistrictings that it undertook in 1959, 1965 and 1971. The district court further found that the 1981 redistricting was calculated at least in part to keep the effects of those prior discriminatory reapportionments in place, as well as to prevent Hispanics from attaining a majority in any district in the future.

Id. at 766. By contrast, the district court in the instant case found that the petitioners had failed to proffer *any* probative evidence of intentional discrimination.

If there was any room for reasonable doubt after *Garza* that summary judgment could be applied to intentional discrimination claims in voting rights cases, that doubt was dispelled by the Ninth Circuit in *Valladolid v. City of National City*, 976 F.2d 1293 (9th Cir. 1992). The plaintiffs in *Valladolid*, like the petitioners in the instant case, asserted claims under both Section 2 *and* the Fourteenth Amendment. The district court entered summary judgment in favor of the defendant municipality on the plaintiffs' Fourteenth Amendment claim. On appeal, the Ninth Circuit affirmed, stating:

> . . . [T]he appellants have presented *no evidence* that the City's at-large system bears more heavily on Hispanics and blacks than on other voters in the City, and they have *failed to point to anything else*, be it in the form of direct or circumstantial evidence, which creates an inference of discriminatory intent in the City's utilization of the at-large system.

Id. at 1298 (emphasis supplied). Thus, on virtually identical facts, the Ninth Circuit reached the same conclusion as the Eleventh Circuit in the instant case.

It is readily apparent that there is not, as claimed by the petitioners in the instant case, any conflict between the Ninth and Eleventh Circuits on the issue of whether summary judgment can be used to dispense with claims of intentional voting discrimination that are unsupported by any probative evidence.

B. The District Court Properly Entered Summary Judgment Against The Petitioners On Their Claim Under The Voting Rights Act

The respondents' summary judgment motion on the petitioners' Section 2 claim was supported in part by the affidavit of an expert statistician, Dr. Michael Maggiotto. [R.79, Appendix Vol. I, Exhibit H]. Dr. Maggiotto's affidavit summarized his analysis of the election results for all BOCC contests between 1980 and 1990 ("the endogenous contests"), and all contested elections for other county offices between 1980 and 1990 in which at least one African-American candidate opposed at least one white candidate ("the exogenous contests"). Dr. Maggiotto's analysis showed an absence of racial bloc voting in Orange County elections. 783 F. Supp. at 1359.

The petitioners proffered no rebuttal evidence on the racial bloc voting issue. As a result, the district court found that the petitioners had failed to satisfy the third precondition for maintaining a vote dilution case under Section 2, *see Thornburg v. Gingles*, 106 S. Ct. at 2765-68,

and entered summary judgment in favor of the respondents.

The petitioners now challenge the district court's reliance on Dr. Maggiotto's affidavit. Petition at 48-52. The petitioners claim that (1) they should have been allowed to prove racial bloc voting by "totality of the circumstances" evidence as an alternative to a statistical analysis of voting records; and (2) Dr. Maggiotto's conclusions were based in part on his analysis of endogenous election contests in which no African-American candidate ran, despite the suggestion of the Fifth Circuit in *Citizens for a Better Gretna v. Gretna*, 834 F.2d 496 (5th Cir. 1987) that such evidence has a limited probative value.

These arguments, however, are without merit.

First, contrary to the petitioners' suggestion, there is nothing in this Court's recent opinions in *Growe v. Emison*, ___ U.S. ___, 113 S. Ct. 1075, ___ L.Ed.2d ___ (1993) or *Voinovich v. Quilter*, ___ U.S. ___, 113 S. Ct. 1149, ___ L.Ed.2d ___ (1993) which addresses the issue of the type of proof that properly can be used to establish the three *Gingles* preconditions. Those cases certainly do not stand for the proposition that racial bloc voting can be proven by "totality of the circumstances" evidence, without any statistical analysis of election results, under circumstances such as those present in the instant case. Here, there was an abundance of objective data directly relevant to the issue of whether racial bloc voting usually affects the outcome of elections in Orange County. Following the filing of the respondents' summary judgment motion, the petitioners simply were unable to rebut the respondents' conclusions drawn from that data.

Second, Dr. Maggiotto's analysis was not flawed due to its being based *in part* on election results from endogenous contests in which there was no African-American candidate. That portion of Dr. Maggiotto's analysis merely served to corroborate his conclusion drawn from the analysis of numerous exogenous contests in which there were African-American candidates. This fact constitutes a critical distinction between the instant case and *Gretna, supra*. Because of this distinction, there is no conflict between the Eleventh Circuit's opinion in the instant case and the Fifth Circuit's opinion in *Gretna*.

C. The Petitioners Were Afforded Full Discovery Rights And An Ample Opportunity To Proffer Evidence In Opposition To The Respondents' Summary Judgment Motion

The petitioners claim that they were "denied access to key witnesses and information." Petition at 56. The record indicates otherwise. The election data upon which Dr. Maggiotto based his analysis was equally available to the petitioners. The petitioners had their own expert statistician, who was retained in connection with the motion for injunctive relief. Had the petitioners' expert been in a position to refute Dr. Maggiotto's conclusions, he undoubtedly would have done so, especially since the petitioners were given 25 additional days to frame their response.

The petitioners also complain that they were deprived of a discovery conference under Fed.R.Civ.P. 26(f). The ordering of a discovery conference, however, is within the sound discretion of the district court, *Bluitt v.*

Arco Chemical Co., 777 F.2d 188 (5th Cir. 1985), and is not required unless the requesting party first complies with certain statutory prerequisites. Here, the petitioners made no attempt whatever to comply with the statutory prerequisites. The district court properly denied the motion without comment, and the denial was not appealed to the Eleventh Circuit.

Finally, the petitioners protest that they have been deprived of "access to the federal judicial system." Petition at 57-59. In the context of their other arguments, it is clear that the petitioners equate "access" with a trial on the merits. The petitioners, however, were not entitled to such a trial. They filed a baseless lawsuit and then were not able to muster any evidence to support their claims. Summary judgment was the appropriate disposition. The district court so found, and the Eleventh Circuit affirmed. There is absolutely no reason for this Court now to involve itself in the rulings by the courts below.

CONCLUSION

For all of the foregoing reasons, this Court should deny certiorari.

Respectfully submitted,

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